# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 481

ALBERT ANDREWS, PETITIONER,

v.

UNITED STATES

No. 484

ROBERT L. DONOVAN, PETITIONER,

v.

UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NO. 481—PETITION FOR CERTIORARI FILED APRIL 14, 1962.
NO. 484—PETITION FOR CERTIORARI FILED JUNE 13, 1962.
CERTIORARI GRANTED OCTOBER 8, 1962.

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 491

ALBERT ANDREWS, PETITIONER,

vs.

UNITED STATES

No. 494

ROBERT L. DONOVAN, PETITIONER,

vs.

UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX


| | Original | Print |
|---|---|---|
| Record from the United States District Court for the Southern District of New York | | |
| Docket entries | 1 | 1 |
| Indictment and endorsements thereon | 8 | 12 |
| Judgment and commitment, December 31, 1954, re Robert L. Donovan | 12 | 16 |
| Judgment and commitment, December 31, 1954, re Albert Andrews | 13 | 18 |
| Transcript of proceedings May 15 and 20, 1957 | 14 | 20 |
| Appearances | 14 | 20 |
| Colloquy between Court and counsel | 15 | 20 |
| Statement by Mr. Friedman | 17 | 21 |
| Statements by Mr. Matthews | 22 | 24 |
| Statement in behalf of Albert Andrews by Mr. Friedman | 27 | 27 |

| | Original | Print |
|---|---|---|
| Record from the United States District Court for the Southern District of New York—Continued | | |
| Transcript of proceedings May 15 and 20, 1957—Continued | | |
| Statement in behalf of Robert L. Donovan by Mr. Healey | 29 | 28 |
| Court's ruling on sentence | 34 | 30 |
| Order reaffirming judgment, May 29, 1957, re Albert Andrews | 39 | 33 |
| Order reaffirming judgment, May 29, 1957, re Robert L. Donovan | 40 | 34 |
| Motion to vacate sentence, re Robert L. Donovan | 41 | 35 |
| Memorandum in support of motion | 42 | 35 |
| Proposed motion re notice of appeal | 44 | 37 |
| Supplement to motion filed under Rule 35, Federal Rules of Criminal Procedure, re Robert L. Donovan | 46 | 39 |
| Memorandum order directing return of defendant for resentencing, June 16, 1961, re Robert L. Donovan | 48 | 40 |
| Affidavit in opposition to motion for resentencing, re Robert L. Donovan | 49 | 41 |
| Stay order, June 28, 1961, re Robert L. Donovan | 55 | 46 |
| Affidavit in support of application for stay, re Robert L. Donovan | 56 | 47 |
| Notice of appeal, re Robert L. Donovan | 58 | 48 |
| Letter requesting vacation of judgment and endorsement thereon, re Albert Andrews | 59 | 49 |
| Affidavit in opposition to letter requesting vacation of judgment, re Albert Andrews | 61 | 50 |
| Notice of appeal, re Albert Andrews | 63 | 52 |
| Notice of motion for stay of order requiring return of Albert Andrews for resentencing, affidavit in support thereof and endorsements thereon | 64 | 53 |
| Notice of motion for stay of order requiring return of Robert L. Donovan for resentencing, affidavit in support thereof, and endorsements thereon | 68 | 56 |
| Clerk's certificate (omitted in printing) | 72 | |
| Proceedings in the United States Court of Appeals for the Second Circuit | 73 | 59 |
| Notice of motion to dismiss appeal, re Robert L. Donovan | 73 | 59 |
| Motion to dismiss appeal and endorsement thereon, re Robert L. Donovan | 74 | 60 |
| Motion to transfer Albert Andrews to Federal Detention Headquarters, and endorsement thereon | 77 | 62 |
| Order denying motion to transfer, August 9, 1961, re Albert Andrews | 79 | 63 |
| Order deferring consideration of motion to dismiss appeal, August 9, 1961, re Robert L. Donovan | 81 | 64 |
| Notice of motion for bail, re Albert Andrews | 83 | 64 |
| Motion to dismiss appeal and motion for bail, and endorsement thereon, re Albert Andrews | 84 | 65 |
| Order denying motion for bail and adjourning motion to dismiss appeal, August 31, 1961, re Albert Andrews | 88 | 68 |

| | Original | Print |
|---|---|---|
| Application for bail and endorsement thereon, re Robert L. Donovan | 90 | 69 |
| Affidavit in opposition to application for bail, re Robert L. Donovan | 95 | 71 |
| Order denying application for bail, October 23, 1961, re Robert L. Donovan | 98 | 73 |
| Opinion, Waterman, J. | 100 | 74 |
| Concurring opinion, Marshall, J. | 104 | 77 |
| Judgment | 105 | 78 |
| Order denying petition for rehearing | 107 | 79 |
| Clerk's certificate (omitted in printing) | 107 | |
| Order extending time to file petition for writ of certiorari, re Robert L. Donovan | 108 | 80 |
| Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari, re Albert Andrews | 109 | 80 |
| Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari, re Robert L. Donovan | 110 | 81 |

[fol. 1]

**IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK**

Crim. No. C 145-191

Criminal Docket

Docket Entries

The United States

vs.

Robert L. Donovan, Albert Andrews, Hyman Cohen

Violation

Title 18, Secs 2114 and 371 USC.

Unlawfully assaulting with intent to rob, steal and purloin mail matter, money etc., a post office employee and jeopardized said employee by use of a dangerous weapon and conspiracy to assault post office employee with intent to rob.

Three counts.

| Date | Name | Amt. Rec'd. | Disb. |
|---|---|---|---|
| 1- 6-60 | A. Andrews | $ 5.00 | |
| 1- 8-60 | Pd. U. S. Tsy | | $ 5.00 |
| **Date** | **Cash Acct. Deft.** | **Rec'd.** | **Disb.** |
| 1- 7-55 | L. P. H. | $10.00 | |
| 1-11-55 | Pd. U. S. Treas. | | $10.00 |
| 1-10-55 | L. P. H. | $ 5.00 | |
| 1-11-55 | Pd. U. S. Treas. | | $ 5.00 |
| 5-29-57 | J. W. Freedman for Donovan and Andrews | $10.00 | |
| 6- 4-57 | Pd. U. S. Treas. | | $10.00 |
| 9- 3-58 | D. H. Gsreenberg | $ 5.00 | |
| 9- 5-58 | Pd. U. S. Treas. | | $ 5.00 |

| Date | Proceedings |
|---|---|
| 10-8-54 | Filed indictment. |
| 10-14-54 | All three defendants plead not guilty. Bail $50,000. for each defendant. Remanded. Ryan, J. |
| 11-3-54 | Filed affdts, by Leo Healy and Murray Cutler for adjournment of trial. |

| Date | Proceedings |
|---|---|
| 12-27-54 | Trial begun as to all three defendants before Hon. L. E. Walsh, J. |
| 12-28-54 | Trial cont'd. |
| 12-29-54 | Trial cont'd. |
| 12-30-54 | Trial cont'd. |
| 12-31-54 | Trial cont'd and concluded. Jury verdict. Guilty as to all three defendants on all three counts. Walsh, J. |
| 12-31-54 | Filed Judgments as to each deft. Twenty Five Years on count two; Five Years on count 3. Sentence on counts 2 & 3 to run concurrently at a place of confinement to be designated by the Atty Genl. Remanded. Sentence continued on other side. |
| [fol. 2] | |
| 12-31-54 | Sentences continued—No sentence imposed on count one because count one merges into sentence on count two upon conviction on counts one and two. Walsh, J. |
| 12-31-54 | Issued commitments and copies as to each defendant. |
| 1-10-55 | Filed notice of appeal as to Robert Donovan. Copy mailed to Warden, U S Det. Hdqtrs NYC 1-10-55. (FEH) Clerk's fee $5.00. |
| 1-7-55 | Filed notice of appeal as to Hyman Cohen. (JWF) Clerk's fee $5.00. |
| 1-7-55 | Filed notice of appeal as to Albert Andrews. (LH) Clerk's fee $5.00. |
| 1-13-55 | Filed election by Robert Donovan not to commence service of sentence 1-12-55. |
| 1-14-55 | Filed commitment and marshal's return. Deft. Albert Andrews delivered to Det Hdq. NYC on Dec. 31, 1954 for service (sentence) or for transfer to another institution. |
| 1-14-55 | Filed commitment and marshal's return. Deft. Robert L. Donovan delivered to Det Hdq. NYC on Dec 31, 1954 for service of sentence or for transfer to another institution. |

| Date | Proceedings |
|---|---|
| 1-14-55 | Filed Remand for Hyman Cohen, Oct 14, 1954. I. R. Kaufman, J. |
| 1-14-55 | Filed election by Albert Andrews not to commence service of sentence Jan 13, 1955. |
| 1-14-55 | Filed Remand for Albert Andrews, October 14, 1955. I. R. Kaufman, Jr. |
| 1-14-55 | Filed Remand for Robert L. Donovan, October 14, 1955. I. R. Kaufman, J. |
| 2-14-55 | Filed commitment and entered marshal's return. Deft. Hyman Cohen delivered to Fed. Det. Hdtrs NYC 2-10-55 for delivery by prison bus to Federal Institution. |
| 3-10-55 | Filed order that Robert Donovan, Deft be allowed prosecute his appeal without being required to prepay fees or costs or give security, because of his poverty and that the deft be furnished a stenographic transcript of trial minutes, at the expense of the Government. Walsh, J. |
| 4-15-55 | Filed election by Robert L. Donovan dated 4-13-55 to resume service of sentence. |
| 5-13-55 | Filed Transcript of record of proceedings, dated Dec. 27, 27, 29, 30 & 31, 1954. |
| 6-2-55 | Filed complaint dated 9-11-54, commrs. commitments and notices of appearance, Leo Healy & Murray Cutler, 16 Courts St. Bklyn for deft. Andrews; Frank E. Healey, 1776 Bway for deft. Donovan and Emanuel Tannenbaum, 51 Chambers St. NYC for Hyman Cohen. |
| 10-25-55 | Filed Transcript of record of proceedings, dated 10-14-54. |
| [fol. 3] | |
| 11-29-55 | Filed letter dated 11-21-55 from deft. Albert Andrews requesting names of trial jurors. Memo endorsed—11-28-55 Application denied. No basis shown for any investigation of any juror. Walsh, J. |
| 3-6-56 | Filed election by Albert Andrews to resume service of sentence. 3-5-56. |
| 7-23-56 | Filed Transcript of record of proceedings, dated 12-30-54. |

| Date | Proceedings |
|---|---|
| 9-28-56 | Filed notice, the certified record on appeal to USCA. |
| 12-31-56 | Filed Transcript of record of proceedings, dated 12-30-54. |
| 1-10-57 | Filed notice that the supplemental to record on appeal has been certified to the US Ca on 1-10-57. |
| 3-25-57 | Filed a true copy of order and opinion received from the US CA affirming the Judgments of the U.S. Dist. Court and action remanded for re-sentencing on Count 2 in accordance with the opinion of this Court. |
| 3-29-57 | Filed notice of settlement and order on Judgment—Judgment of US CA made justment of this Court. Clancy, J. |
| 4-25-57 | Filed affidavit of Adelbert C. Matthews, Jr. for a Writ of Habeas Corpus Ad Prosequendum for Robert L. Donovan. Iss. Writ. Ret. 5-15-57. |
| 4-25-57 | Filed affidavit of Adelbert C. Matthews, Jr. for a Writ of Habeas Corpus Ad Prosequendum for Hyman Cohen. Iss. Writ. Ret. 5-15-57. |
| 4-25-57 | Filed affidavit of Adelbert C. Matthews, Jr. for a Writ of Habeas Corpus Ad Prosequendum for Albert Andrews. Iss. Writ. Ret. 5-15-57. |
| 5-20-57 | All three defendants are produced in court on writs of habeas corpus ad prosequendum for "resentencing" on count two pursuant to judgment of U.S.C.A.<br>Sentences of Donovan and Andrews to remain unchanged.<br>Orders to be submitted.<br>As to the defendant Cohen the Execution of Sentence on count two is suspended. Defendant placed on probation for five (5) years, to begin upon termination of sentence on count three, subject to the standing probation order of this court. Order to be submitted. Walsh, J. |
| 5-28-57 | Filed notice of motion by Robert L. Donovan for leave to appeal in forma pauperis. Motion granted 5-27-57. Walsh, J. |
| 5-28-57 | Filed notice of appeal by Robert L. Donovan. |

| Date | Proceedings |
|---|---|
| 5-29-57 | Filed Order resentencing Hyman Cohen on count two. Execution of sentence on ct 2 suspended. Probation for 5 yrs to begin upon termination of sentence of 5 yrs he is presently serving on count 3, subject to the standing probation order of this Court. Walsh, J. |
| 5-29-57 | Filed Order that sentence of Albert Andrews dated 12-31-54 remain unchanged. Walsh, J. |
| [fol. 4] | |
| 5-29-57 | Filed Order that sentence of Robert L. Donovan dated 12-31-54 remain unchanged. Walsh, J. |
| 5-29-57 | Issued certified copies of orders as to three defendants filed 5-29-57 to U. S. marshal. |
| 5-29-57 | Filed notice of appeal by Robert L. Donovan. Clerk's fee $5.00. |
| 5-29-57 | Filed notice of appeal by Albert Andrews. Clerk's fee $5.00. |
| 6-5-57 | Filed writ of habeas corpus ad prosequendum dated 4-24-57 for Hyman Cohen and entered Marshal's execution dated 4-30-57. Writ satisfied on 5-20-57. Walsh, J. |
| 6-5-57 | Filed writ of habeas corpus ad prosequendum dated 4-24-57 for Robert L. Donovan and entered Marshal's execution dated 5-5-57. Writ satisfied on 5-20-57. Walsh, J. |
| 6-5-57 | Filed writ of habeas corpus ad prosequendum dated 4-24-57 for Albert Andrews and entered Marshal's execution dated 5-11-57. Writ satisfied on 5-20-57. Walsh, J. |
| 6-5-57 | Filed a true copy of order dated 5-29-57 as to Albert Andrews. Ordered, that the judgment dated 12-31-54, entered herein, remain unchanged and in full force and effect. Walsh, J. |
| 6-5-57 | Filed a true copy of order dated 5-29-57 as to Robert L. Donovan. Ordered, that the judgment dated 12-31-54, entered herein, remain unchanged and in full force and effect. Walsh, J. |

| Date | Proceedings |
|---|---|
| 6-5-57 | Filed a true copy of order dated 5-29-57 as to Hyman Cohen. Ordered, that the execution of the sentence of 25 years on count 2 be and hereby is suspended and defendant placed on probation for a period of 5 years, to begin upon termination of sentence of 5 years he is presently serving on count 3, subject to the standing probation order of the Court. Walsh, J. |
| 6-13-57 | Filed Transcript of record of proceedings, dated May 15 & 20, 1957. |
| 7-3-57 | Filed notice of motion by Robert Donovan for an order granting the petition to elect not to commence service pursuant to Rule 38, and to have petitioner transferred to the Second Circuit wherein he can more properly prosecute his appeal. 7-22-57 Motion denied without prejudice to renew. Dimock, J. |
| 7-5-57 | Filed notice of motion by Albert Andrews for an order granting the petition to elect not to commence service pursuant to Rule 38, and to have petitioner transferred to the Second Circuit wherein he can more properly prosecute his appeal. 7-22-57 Motion denied without prejudice to renew. Dimock, J. |
| 7-11-57 | Filed affdt. and notice of motion by Robert Donovan and Albert Andrews for an order for an enlargement of 90 days within which to perfect and docket appeal to US CA. 7-22-57 Motion argued. Motion granted. Deft. allowed 60 days to perfect and docket appeal. Dimock, J. |
| 7-22-57 | Filed affidavit of Adelbert C. Matthews, Jr. in opposition to Defendants' motions. |
| 9-19-57 | Filed notice that the record on appeal had been certified to the US CA on 9-19-57. |
| 4-1-58 | Filed true copy of judgment and opinion judgment of the U.S.C.A. Judgment of the Dist. Court as to defts. Donovan, and Andrews, affirmed. |

| Date | Proceedings |
|---|---|
| 4-11-58 | Filed notice of settlement and order on judgment —Judgment of US CA as to Robert L. Donovan and Albert Andrews made judgment of this Court. Cashin, J. |
| [fol. 5] | |
| 7-23-58 | Filed notice of motion to correct or reduce the sentence as to deft Albert Andrews. |
| 8-25-58 | Filed Opinion # 24557—Palmieri, J. Defendant's motion to reduce or correct sentence is denied in all respects. It is so ordered. Mailed notice. |
| 9-3-58 | Filed notice of appeal as to Albert Andrews. Clerk's fee $5.00. |
| 9-5-58 | Filed letter of deft. Albert Andrews dated 8-31-58 to Charlson, Clerk, Re Notice of appeal. |
| 9-15-58 | Filed affidavit and petition for leave to appeal in forma pauperis as to deft. Albert Andrews. 9-22-58 Respectfully referred to Judge Palmieri. Kaufman, J. |
| 10-8-58 | Filed Transcript of record of proceedings, dated 8-4-58. |
| 10-8-58 | Filed notice—supplemental record on appeal certified to the U.S.C.A. as to deft. Albert Andrews. |
| 10-10-58 | Filed Opinion # 24619 by Palmieri, J—Defendant's (Andrews) application for permission to prosecute appeal in forma pauperis granted. Time for filing the record on appeal and docketing proceeding is extended to Oct. 28, 1958. It is so ordered. |
| 10-10-58 | Filed affidavit of Asst. U.S. Attorney Gordon in opposition to Andrews' motion to proceed in forma pauperis. |
| 10-14-58 | Filed notice—supplemental record on appeal certified to the U.S.C.A. as to deft Albert Andrews. |
| 3-10-59 | Filed true copy of judgment and opinion of the U.S.C.A. that the order of the District Court hereby is affirmed. Daniel Fusaro, Clerk. (deft Albert Andrews) |

| Date | Proceedings |
|---|---|
| 3-20-59 | Filed notice of settlement and order on judgment of the U.S.C.A. that the judgment is made the judgment of this Court, as to deft Albert Andrews. Noonan, J. |
| 6-10-59 | Albert Andrews—Filed Petition, Exhibits and Notice of Motion pursuant to Rule 60(b) of the Fed. Rules of Civil Procedure for an order granting relief from a denial of defts motion for correction or reduction of sentence under Rule 35, F.R.C.P. 6-22-59 Respectfully referred to Judge Palmieri. Dimock, J. |
| 6-22-59 | Filed affidavit of George I. Gordon, Esq., Ass't U.S. Attorney in opposition to defendants' motion for relief from order denying motion for reduction of sentence. |
| 6-25-59 | Memo endorsed on motion filed 6-10-59 on behalf of defendant Andrews. "This motion, improperly brought under Fed.R.Civ.P.60(b) Civ.P.1, is treated as a motion under Fed. R.Crim.P. 35 and 28 USC Sec 2255. • • • The motion is in all respects denied. So Ordered." Palmieri, J. (notice mailed) |
| 6-30-59 | Filed petition of Defendant Andrews dated 6-24-59 requesting that his motion filed 6-10-59 be entertained under Sec. 2255. Memo. endorsed —No further action on the part of the Court is required since relief requested has been afforded the defendant. Palmieri, J. |
| [fol. 6] | |
| 11-2-59 | Albert Andrews—filed affidavit and notice of motion to set aside and vacate sentence pursuant to Title 28, Sec. 2255 USC.—12-16-59—Argued—Decision reserved. Murphy, J. |
| 12-29-59 | Albert Andrews—Filed affidavit of Herbert Bruce Greene, Ass't U.S. Atty in opposition to motion pursuant to T. 28, U.S.C., Sec. 2255. |
| 12-29-59 | Albert Andrews—Filed Memorandum # 25613 —Murphy, D.J.—"Motion pursuant to Sec. 2255, 28 U.S.C., denied. • • • This is an order. No settlement is necessary. Murphy, J." (See Memorandum). (mailed notice) |

| Date | Proceedings |
|---|---|
| 1-6-60 | Albert Andrews—Filed Notice of Appeal from denial of motion under Title 28, Sec. 2255. Clerk's fee $5.00. |
| 1-15-60 | Albert Andrews—Filed Affidavit & Notice of Motion to appeal in forma pauperis. Motion to appeal in formr pauperis referred to Judge Murphy on 1-25-60. Weinfeld, J. |
| 1-28-60 | Albert Andrews—Filed Affidavit of Asst. U.S. Atty H. B. Greene in opposition to motion for permission to appeal in Forma Pauperis. dated 1-25-60. |
| 1-28-60 | Albert Andrews—Filed Memorandum—Murphy, D.J. # 25699—"Application for an order to appeal in forma pauperis is denied . * * * See our memorandum dated 12-29-59. This is an order. No settlement is necessary." (See Memorandum) (Def't notified). |
| 2-10-60 | Albert Andrews—Filed notice that record has been certified to the U.S.C.S. |
| 4-26-60 | Albert Andrews—Filed True Copy of Judgment of U.S.C.A.—Ordered that the motion for leave to proceed in forma pauperis be and it hereby is denied. Further ordered that the appeal from the order of U.S.D.C. for the SDNY be and it hereby is dismissed. A. Daniel Fusaro, Clerk. |
| 6-16-60 | Albert Andrews—Filed notice of settlement & Order on judgment that the judgment of the U.S.C.A. is made the judgment of this Court. Kaufman, J. Judgment entered 6-16-60—Herbert A. Charlson, Clerk. (notified) |
| 4-17-61 | Robert L. Donovan—Filed deft's "Motion to vacate illegal sentence", pursuant to Rule 32(a) and Rule 35, Federal Rules of Criminal Procedure and deft's request "that the Court order the Clerk to prepare and file a Notice of Appeal should the Court deny the motion under Rule 35 * * * ". |
| 4-26-61 | Robert L. Donovan—Filed supplement to Motion filed under Rule 35, Fed. Rules of C.P. |

| Date | Proceedings |
|---|---|
| 6-6-61 | Robert L. Donovan—Motion to vacate illegal sentence submitted—Decision reserved. Murphy, J. |
| 6-19-61 | Robert Donovan—Filed Opinion # 27006 by Murphy, J.—"Deft's motion is granted and it is ordered that he be returned to this district for resentencing. * * * This is an order. No settlement is necessary." Murphy, J. Deft. notified. |
| 6-19-61 | Robert Donovan—Filed letter of deft. to Chief Judge, dated 5-17-61. Filed Affidavit of Deft. in reply to affidavit in Opposition, sworn to 6-8-61. Filed Affidavit of A. I. Rosett, asst U.S. Atty in opposition to motion of deft. for resentencing. |
| 6-29-61 | Robert L. Donovan—Filed Affidavit and Order that the provision of the order of 6-16-61 requiring the return of the deft. to the Southern District of New York for resentencing be and the same is stayed up to and including July 17, 1961. Murphy, J. |
| [fol. 7] | |
| 7-14-61 | Filed Notice of Appeal by United States Attorney from order of Judge Murphy granting defendant Donovan's motion under Rule # 35. |
| 7-19-61 | Albert Andrews—Filed letter to Judge Murphy, from def't, dated 6-25-61 requesting that the judgment be vacated. Memorandum endorsed: "7-18-61—Motion granted. Let the defendant be resentenced. Murphy, D.J." (Def't notified). |
| 7-19-61 | Albert Andrews—Filed Affidavit of Arthur I. Rosett, Ass't U.S. Atty, dated 6-30-61, in opposition to letter of def't to vacate sentence under Title 28, Sec. 2255, U.S.C. |
| 7-31-61 | Albert Andrews—Filed Government's Notice of Appeal from Order of Judge Murphy dated 7-18-61 granting defendant Andrews' motion under Title 28, Sec. 2255. |

| Date | Proceedings |
|---|---|
| 8-1-61 | Albert Andrews—Filed affidavit and notice of motion of Arthur I. Rosett, Asst. U.S. Atty. for a stay of the order of Judge Murphy requiring the return of the deft. Andrews to the Southern District of New York for re-sentencing. 8-7-61—"Respectfully referred to Judge Murphy". Herlands, J. |
| 8-1-61 | Robert L. Donovan—Filed affidavit and notice of motion of Arthur I. Rosett, Asst. U.S. Atty. for a stay of the order of Judge Murphy requiring the return of the deft. Donovan to the Southern District of New York for re-sentencing. 8-7-61—"Respectfully referred to Judge Murphy". Herlands, J. |
| 8-8-61 | Robert L. Donovan—Memo endorsed on motion papers filed 8-1-61—"Motion granted." (deft. notified) Murphy, J. |
| 8-8-61 | Albert Andrews—Memo endorsed on motion papers filed 8-1-61—"Motion granted." (deft. notified) Murphy, J. |
| 8-17-61 | Robert L. Donovan—Memo endorsed on reply affidavit of deft., sworn to 8-14-61—"This reply has been read. Please file." Murphy, J. |
| 8-18-61 | Robert L. Donovan—Field reply affidavit of deft., sworn to 8-14-61—re: resentencing. |
| 8-21-61 | Robert L. Donovan—Filed Letter of Defts' addressed to Judge Murphy, dated 8-17-61. Endorsement—"To The Clerk. Please File" Murphy, J. (signed 8-21-61) |

[fol. 8] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. C 145-191

UNITED STATES OF AMERICA,

v.

ROBERT L. DONOVAN, ALBERT ANDREWS, and HYMAN COHEN, Defendants

INDICTMENT—Filed October 8, 1954

The Grand Jury charges:

1. On or about the 10th day of September, 1954, in the Southern District of New York, Robert L. Donovan, Albert Andrews and Hyman Cohen, the defendants herein, unlawfully, wilfully and knowingly did assault with intent to rob, steal and purloin mail matter, money and property of the United States, from a United States Post Office Department employee, to wit, Ezio G. Fragale, who had lawful charge, control and custody of said mail matter, money and property of the United States at the time of said assault.

(Title 18, United States Code, Section 2114)

Count Two

The Grand Jury further charges:

1. On or about the 10th day of September, 1954, in the Southern District of New York, Robert L. Donovan, Albert Andrews and Hyman Cohen, the defendants herein, unlawfully, wilfully and knowingly did assault with intent to rob, steal and purloin mail matter, money and property of the United States, from a United States Post Office Department employee, to wit, Ezio G. Fragale, who had lawful charge, control and custody of said mail matter, money and property of the United States at the time of said assault. [fol. 9] 2. In attempting to effect such robbery, Robert L. Donovan, Albert Andrews, and Hyman Cohen, the de-

fendants herein, did put the life of a United States Post Office Department employee, to wit, Ezio G. Fragale, in jeopardy by the use of a dangerous weapon, to wit, a loaded 38 Smith and Wesson Special revolver.

(Title 18, United States Code, Section 2114).

Count Three

The Grand Jury further charges:

1. On or about the 1st day of August, 1954, and continuously thereafter up to and including the 10th day of September, 1954, in the Southern District District of New York, Robert L. Donovan, Albert Andrews, and Hyman Cohen, the defendants herein, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed, together and with each other, and with divers other persons to the Grand Jury unknown, to commit offenses against the United States, to wit, to violate the United States Code, Title 18, Section 2114.

2. It was a part of said conspiracy that the said defendants would unlawfully, wilfully and knowingly assault an employee of the United States Post Office Department while said employee had lawful charge, control and custody of mail matter and money and other property of the United States, with intent to rob, steal and purloin such mail matter, money and other property of the United States.

Overt Acts

1. In pursuance of the said conspiracy and to effect the objects thereof, on or about the 10th day of September, 1954, in the Southern District of New York, Albert Andrews and Hyman Cohen had a conversation.

[fol. 10] 2. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 10th day of September, 1954, in the Southern District of New York, Robert L. Donovan and Albert Andrews had a conversation.

3. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 10th day of September, 1954, in the Southern District of New York, Robert L. Donovan held a loaded 38 Smith and Wesson Special

revolver on a driver of a United States Post Office Department mail truck.

4. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 10th day of September, 1954, in the Southern District of New York, Robert L. Donovan wore the uniform of a United States Post Office Department employee.

(Title 18, Section 371, United States Code).

J. Edward Lumbard, United States Attorney.

Martin Kennedy, Foreman.

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[fol. 11] C 145-191

U. S. District Court

The United States of America

vs.

Robert L. Donovan, Albert Andrews, and Hyman Cohen, Defendants

Indictment

Assault of a person in control of mail matter with intent to rob said mail and conspiracy so to do, in violation of Title 18, United States Code, Sections 371 and 2114.

J. Edward Lumbard, United States Attorney.

A True Bill

(Illegible), foreman.

October 14, 1954.

All three defendants Pleads not guilty—Bail $50,000. for each defendant. Remanded.

Before: Hon. V. L. Leibell, D. J.—Ryan, J.

November 5, 1954—Case called and Set down for Trial for November 22, 1954, 10:30 A.M.

December 27, 1954—Trial begun as to all three defendants. Before Hon. L. E. Walsh, J.

December 28, 1954—Trial con't.

December 29, 1954—Trial con't.

December 30, 1954—Trial con't.

December 31, 1954—Trial con't. and concluded. Jury's verdict of guilty on three counts for all three defendants. Sentence 25 yrs on ct. 2 and 5 yrs. on ct 3 for each deft. Walsh, J. Sentence to run concurrently.

May 20, 1957.

All three defendants are produced in Court on writs for "resentencing" on count 2 persuant to judgment of USCA—

Sentences of Donovan and Andrews to remain unchanged —Orders to be submitted.

Execution of sentence on count two as to defendant Cohen is suspended. Deft. placed on probation for 5 years to begin upon termination of sentence on count 3—order to be submitted.

Subject to the Standing Probation Order of this Court.

/s Walsh, J.

[fol. 12] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. C 145-191

UNITED STATES OF AMERICA,

v.

ROBERT L. DONOVAN

JUDGMENT AND COMMITMENT—December 31, 1954

On this 31st day of December, 1954, 19— came the attorney for the government and the defendant appeared in person and [1] by counsel.

It is Adjudged that the defendant has been convicted upon his plea of [2] not guilty and a verdict of guilty by a jury of the offense of unlawfully, wilfully and knowingly did assault with intent to rob, steal and purloin mail matter, money and property of the United States from a Post Office Department Employee, who had lawful charge, control and custody of said mail matter, money and property of the United States at the time of said assault, and in attempting to effect such robbery, did put the life of said employee in jeopardy by the use of a dangerous weapon, to wit, a loaded 38 Smith and Wesson Special revolver and conspiracy so to do as charged [3] T 18 Sec. 2114 and 371 USC and the court having asked the defendant whether he has anything to say why judgment should not be pro-

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[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

nounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of [4] Twenty Five (25) Years on count two. Five Years (5) on count three.

Sentence on counts 2 & 3 to run concurrently.

No sentence imposed on count one, because count one merges into sentence on count two upon conviction on counts one and two.

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Lawrence E. Walsh, United States District Judge.

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[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

[fol. 13] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. C 145-191

UNITED STATES OF AMERICA,

v.

ALBERT ANDREWS

JUDGMENT AND COMMITMENT—December 31, 1954

On this 31st day of December, 1954, came the attorney for the government and the defendant appeared in person and [1] by counsel.

It is Adjudged that the defendant has been convicted upon his plea of [2] not guilty and a verdict of guilty by a jury of the offense of unlawfully, wilfully and knowingly did assault with intent to rob, steal and purloin mail matter, money and property of the United States from a Post Office Department Employee, who had lawful charge, control and custody of said mail matter, money and property of the United States at the time of said assault, and in attempting to effect such robbery, did put the life of said employee in jeopardy by the use of a dangerous weapon, to wit, a loaded 38 Smith and Wesson Special revolver and conspiracy so to do as charged [3] T 18 Sec. 2114 and 371 USC and the court having asked the defendant whether he has anything to say why judgment should not be pro-

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[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

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[3] Insert "in count(s) number . " if required.

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It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of [4] Twenty Five (25) years on count two. Five years (5) on count three.

Sentence on counts 2 & 3 to run concurently.

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Lawrence E. Walsh, United States District Judge.

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[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

[fol. 14] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

vs.

ROBERT L. DONOVAN, ALBERT ANDREWS and HYMAN COHEN,
*Defendants.*

Before: Hon. Lawrence E. Walsh, District Judge.

**Transcript of Proceedings, May 15, 1957**

APPEARANCES:

Paul W. Williams, Esq., United States Attorney, for the Government; By: Adelbert C. Matthews, Jr., Esq., Assistant United States Attorney.

Jacob W. Friedman, Esq., Attorney for Defendants Albert Andrews and Hyman Cohen.

Frank A. Healey, Esq., Attorney for Defendant Robert L. Donovan.

[fol. 15] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Friedman: If your Honor please, your Honor will recall that this matter was before your Honor sometime ago. I am counsel for all three defendants. I think briefs were requested. I have been engaged in court constantly and I haven't had time to prepare it. The questions are rather difficult, as to the extent of your Honor's power.

Would your Honor be kind enough to put this sentence over one week? Your Honor originally set it for 2:30 today.

The Court: Has the Government any objection?

Mr. Matthews: No serious objection. I do not know that we need a week on it. They are here on writs. We can continue the writs.

Mr. Friedman: I cannot be ready before a week, your Honor, as I have a court engagement and I am leaving town tomorrow for three days. But I want to get a brief in to your Honor in time to present the views of the defendants

as to the powers of your Honor. There seems to be some question as to the extent of your Honor's power.

The Court: One thing I cannot understand is that this thing has been here almost sixty days.

Mr. Matthews: Yes.

[fol. 16] The Court: This date has been fixed for a long time. Frankly, I do not want this resentence procedure used to extend a visit to New York.

Mr. Friedman: That is not the purpose, your Honor, I can assure your Honor. I just want to make sure that I get my views on the subject of resentence before your Honor and the law on it.

The Court: I will give you until Monday afternoon at 2.30.

(Adjourned to May 20, 1957, at 2.30 p.m.)

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[fol. 17] New York, May 20, 1957, (2:30 p. m.)

The Clerk: United States vs. Donovan, Andrews and Cohen.

Mr. Matthews: Ready.

Mr. Friedman: Ready.

The Court: Are the defendants present?

Mr. Friedman: I understand that they are on their way up, your Honor.

The Court: All right.

Mr. Friedman: I am sorry, your Honor, but I did not have the opportunity, as I was away for a few days, to prepare a memorandum of law.

The Court: Yes.

STATEMENT BY MR. FRIEDMAN

Mr. Friedman: There is some question raised in this case with regard to the lesser offense being merged into the later offense and the separability of the two, and it does seem to me that there is a difference of opinion in the reported cases as to whether the defense involving an em-[fol. 18] ployee of the Government merges in the greater offense of robbing under circumstances as to put his life in jeopardy.

Now, there are a number of cases, one of which is a case in the Supreme Court of the United States, which held that they were separate offenses, and including several cases in the Tenth Circuit and one in the Eighth Circuit. And it was pointed out in one of those cases, Schultz v. Zerbst, 73 Fed. 2d, 668, that the evidence which sustains the offense charged in the first count—and it happened in this particular case that the offenses were numbered the same way as they are in the case at bar, namely, assault with intent to rob, would be wholly insufficient in support of evidence of robbery effected by putting lives of persons in charge of mail matter in jeopardy as charged in the second count of the indictment, as each required proof of a different fact or element, and the Court there said as follows:

That Counts 1 and 2 charge different offenses, they were separate and distinct, and for the conviction separate penalties might be inflicted upon him, that is, the defendant, in that particular case.

Now, there is one other point that I want to call to your [fol. 19] Honor's attention, and that is that the United States Court of Appeals in the case at bar pointed out as as to the statute apparently making the 25-year residence mandatory, that under that statute the Court has the power of not merely to impose the sentence but the Court likewise has the power to suspend the imposition of the sentence, and that is not mere verbiage in the statute. The two words are separately stated.

And it was held in Riggs-vs. United States, a 4th Circuit case, 14 Fed. 2d, page 5, and Driver v. United States, 232 Fed. 2d, 418, a rather recent case, that a proper construction of the probation statute empowers the Court if in its discretion to suspend the imposition of sentence, that the Court is not constrained or obliged immediately upon a conviction to impose sentence at all. And there is a sharp distinction in the cases on probation as to the time of suspending the execution of the sentence as the statute empowers the Court to do for a period of five years, and the power to suspend the imposition of sentence if the Court feels that some good would be served thereby.

Our point is, apart from the legal difficulties incident [fol. 20] to the imposition of sentence, the United States Court of Appeals remanded the case for resentence under

Count 2, and it could be argued that under those circumstances your Honor does not have any jurisdiction to impose sentence on Count 1.

Whether that supposition in there can add much, I am not prepared to say, but I do want to point this out, though: Factually, your Honor, that the defendants in this case were arrested on September 10, 1954, which was a period of over two years and eight months ago. At no time during that period were any of the defendants out on bail, so that each defendant has now served a period of two years and eight months considering the benefits to be taken into consideration with the allowances of the possibility of the defendants being admitted to parole after the service of one-third of the sentence, which may be viewed as the equivalent of a sentence of over eight years, and I would respectfully ask your Honor to give that such consideration.

With regard to the prospective cases, the District Attorney, I understand, your Honor has comprehensive reports concerning their families and their background.

[fol. 21] I do want to point out or remind your Honor that at the time the sentence was imposed in this case, which was in December of 1954, that your Honor will recall as to the circumstances at that time, but since that time because of the execution of the appeal and limited means of the family I was engaged to represent all of the defendants. In fact, I argued on behalf of all of them in the United States Court of Appeals. The defendants are differently situated, but your Honor will remember this, no doubt, that when the time came to impose sentence your Honor was under the impression that your Honor had to follow a mandatory provision of the Statute, or what appeared to be a mandatory provision under the Statute apart from other statutes, and your Honor then said that if you could be shown otherwise by counsel your Honor would be very happy to consider it or to entertain it.

For some reason, at that time I did not or could not, that is, did not know anything about the law, not that I know much about it now, but at that time I knew less, and was not able to call any opinion to your Honor's attention which would cause your Honor to take a different view, [fol. 22] but your Honor did give the distinct impression in December, 1954, that had your Honor been fully satisfied

as to the powers of the Court, your Honor would have done otherwise.

Well, at any rate, your Honor felt you could not, and you, therefore, imposed a 25-year sentence. Finally we got the ruling of the higher court that your Honor does have the power to suspend either the imposition or the execution of the sentence as your Honor sees fit with respect to the second count of the indictment.

The 5-year sentence as imposed on the conspiracy or third count of the indictment remains unaffected.

The Court: I think I have got your point on the law.

Mr. Matthews: May I say a word, your Honor?

The Court: Yes.

STATEMENTS BY MR. MATTHEWS

Mr. Matthews: I would like to add a few things to that, your Honor. I have submitted a memorandum of law which I think sets forth the Government's view, in other words, which is this, it is not a question of point of view but what the Legislature has done that the Government [fol. 23] respectfully states that your jurisdiction is now limited to either giving the defendant a suspended sentence on Count 2, or a sentence of 25 years on Count 2, and there is no question now as to resentencing on Count 3. I think that is pretty clear by the opinion of the Court of Appeals in this case, and I set out the pertinent part in the Government's brief.

I have also requisitioned the file in the case, which is the judgment of conviction, certified copy of the judgment of conviction of the Court of Appeals, and also the order on judgment, and I have inserted therein papers which indicate those two documents. They both specifically state that the case is remanded for resentencing on Count 2 without any reference to either Count 1 or Count 3.

I would just like to make reference to a couple of cases cited by Mr. Friedman, not having the memorandum heretofore, and just having had a chance to look at it, I think he cited three cases for the proposition that there is no merger as respects Counts 1, and 2. One of those cases are Schultz v. Zerbst, 73 Fed. 2d, 668, and the other is Sansone v. Zerbst, 73 Fed. 2d, 670.

[fol. 24] Both of those cases were cited in the Government's brief to the Court of Appeals, and they do stand for the proposition for which Mr. Friedman speaks of. However, the Government also cited the cases of Kosner v. United States and Brooks v. United States for the contrary proposition that there is a merger as respects Counts 1 and 2.

It is, of course, significant that the Court of Appeals in writing their opinion stated that there was a merger of the lesser offense to the more aggravated form of offense and cited the Kosner case and the Brooks case and did not cite the Schultz and Sansone cases. In fact, if my memory serves me correctly, one of the cases refers to the Schultz case and referred to the rationale of it.

So I respectfully submit to your Honor that your power or your jurisdiction is now limited to a resentencing on just Count 2.

The Court: Well, I think that this is about as far as we need go now without the defendants being present. Therefore we will take a short recess on this matter and go ahead with the Hudson & Manhattan until the defendants are brought up here and are present.

[fol. 25] (Short recess)

The Clerk: United States v. Donovan and others.

The Court: Are all of the defendants present now?

The Clerk: Yes, sir.

The Court: Is there anything you want to say now?

Mr. Matthews: Yes, your Honor. As your Honor is aware, this involves the resentencing of the three defendants, Donovan, Andrews and Cohen, and as your Honor was the trial judge in this matter I don't think it is necessary to go into detail as to the facts except in a very, very general way.

As you will recall, there was a holdup with a revolver of the United States mail truck. The actual attempted holdup with the revolver was performed by Donovan. The person who planned and helped execute the holdup was the defendant Andrews, and Mr. Cohen's part in it was that he was an employee of the post office at that time, and he informed Andrews, who in turn informed Donovan as to what truck they though held the money and registered mail.

And, of course, he was aware that a holdup was to take place and it was to be an armed robbery.

[fol. 26] The Government does not have much information on the background of these individual defendants, your Honor, but I notice that you have a presentence report. However, if you want any additional information I will be glad to attempt to supply it. None of them have a prior record; that is, I mean Cohen does not have a prior record; Andrews does not have a prior record, but Donovan has an extensive prior record, and if you wish I will read off what I have on that.

The Court: No, I don't think it is necessary.

Mr. Matthews: That is about all the Government would say at this time.

Mr. Friedman: If your Honor please, Mr. Frank Healey is now present and he will also say something on behalf of the defendant Donovan, and I will address a few remarks to your Honor with respect to the defendant Cohen and the defendant Andrews.

The Court: All right.

Mr. Friedman: As your Honor knows, he was a post office employee and prior to that he was a butcher by occupation. I think his record has been excellent. We know he has taken courses in dermatology and bacteriology. He [fol. 27] also conducted a school where he taught foreign persons the barbering trade and he is in a position where if he could have his liberty he could resume that occupation of being a barber.

He has a family which stands solidly behind him in this matter. His father there and his brothers are in court right now.

Your Honor will recall that there was some incident involving some other woman which is now a thing of the past. His wife is devoted to him. She is ready if he regains his liberty to resume living with him, and taking one thing with another I think that in the interest of justice he is entitled to the most extreme leniency that the Court can give him under the circumstances.

STATEMENT IN BEHALF OF ALBERT ANDREWS BY MR. FRIEDMAN

With regard to the defendant Andrews, your Honor, he has a good background. I think he is 29 years old this month. He was 26 years old when he was arrested and he has no prior criminal record. He is a high school graduate, has some college education. His family has backed him also and his sister and has constantly hounded me to aid her brother on the appeal and she is giving up her own earnings and sacrificing all of her time and efforts in his behalf.

[fol. 28] As your Honor knows in cases of this kind the real sufferers are the relatives and family almost to the same degree as the prisoners themselves.

The United States Court of Appeals in its opinion, and in addition to the things that were included in the discussion that we had before, they had this to say in its opinion, or summed it up in this fashion:

They used these two expressions, and they said that your Honor was given a choice between the possible inadequate sentence of five years and the possible excessive sentence of 25 years, which your Honor felt was mandatory at the time of the imposition of sentence.

I say to your Honor in accordance with the modern criminology practice the best possible sentence for any defendant is the least sentence that is consonant with justice and fairness, and if one sentence is possibly inadequate and the other sentence is possibly excessive, I think, your Honor, if that is the choice which your Honor is confronted with under the law, that your Honor should incline toward the sentence which is possibly inadequate.

[fol. 29] And, as I pointed out before, considering the time already served, that adds up to the equivalent of eight years when you consider a man is given one-third off of the sentencing time because of good behavior and the like, it is equivalent to an 8-year sentence.

The situation of Andrews is further complicated by the fact that the period of time lapsed, or the period of time which had elapsed before he elected to commence his sentence, so that he does not have the credit as he would have had in the event that he commenced his service of sentence immediately.

Taking all of those things into consideration I ask your Honor on behalf of these unfortunate men and their families to make due allowance and give them the most consideration that the law can permit you to do under the circumstances.

STATEMENT IN BEHALF OF ROBERT L. DONOVAN BY MR. HEALEY

Mr. Healey: If it please the Court, I was in the case from the very beginning as Mr. Friedman was. I am quite familair with all the facts and it was my opinion—and I say this in view of your Honor's statement at the end of the trial, that your Honor felt that if a lesser sentence would be given here—I don't know if your Honor had in mind a 5-year sentence—that your Honor probably would have given it.

[fol. 30] Now, this was an unsuccessful attempt by these men with regard to this matter, and with regard to what happened on the truck, Donovan, who, I understand, at one time wrote a letter saying that he was willing to take a lie detector test, that he never had the gun in his possession, to go ahead and commence the holdup of the truck and put the life of the driver in jeopardy, but be that as it may he was convicted.

Going into his background, he is 31 years of age. He has a criminal record, but I say this to your Honor, that we should look into the criminal record and find out why, and we see that he comes from a very poor family. He comes from a very poor family, lives on the east side, has a very meager education and has been fitted for no particular occupation, and ordinarily he is not the type of case that you have in these violations that your Honor customarily has before you. The family, Judge, today consists of four children and a wife, all minor children.

I might say this also, Judge, that I am here this afternoon pleading not only for Donovan, but for the four children, and his wife. They are in very poor circumstances, your Honor, on welfare. The wife is in court and the [fol. 31] circumstances of the family are such that they just about live off the neighborhood or the welfare and charity of others.

There is some hope and anxiety which has gone into this matter, Judge, because ever since they were convicted, and considering your Honor's statement after the sentence——

The Court: What statement is that now, Mr. Healey, that you are actually referring to? I believe you said that before.

Mr. Healey: That is the statement, your Honor, where your Honor said that if it could be shown that you had discretion with regard to the 25-year sentence, I believe it was on the last day of sentence.

The Court: That is what I told Mr. Friedman, that I would not hold up the sentence.

Mr. Healey: Correct. I say this, Judge, maybe erroneously we relied on it, but in any event we relied on it to some extent.

Donovan, of course, has been in jail ever since December 1954, together with the others, and the anxiety and the hope that they experienced, Judge, in coming before your Honor again on sentence I trust will be considered and taken into consideration by you.

[fol. 32] There must be some punishment, there is not any doubt in my mind about that. However, Donovan has a good record while in prison. He has sent some money home as best he can that he made in prison for the support of his family and his four children which range in ages from 4 to 6 years old. They live under poor circumstances and I respectfully submit, your Honor, that if your Honor does impose a sentence that it be a minimum sentence and that you suspend the 25 years and put him on probation for the period, as I am sure that that will be enough deterrent to prevent Donovan from ever going into danger again, and not only that but it would put him under the jurisdiction of this Court and your Honor would have the right to impose such a sentence if he comes before you, that is, impose the 25-year sentence again, and I respectfully submit that to your Honor.

Another thing is this, Judge:

At the time this case was tried I met Mr. Donovan's mother and, of course, she was in court throughout the entire proceeding and shortly thereafter the mother expe-

rienced a heart attack and died while Donovan was in jail. He was very much attacher to her, Judge, and there is [fol. 33] not any doubt in my mind that it struck a serious blow to the defendant. I am inclined to think, having spoken to him, that it did have some effect upon him in regard to the violations that he committed, the seriousness of the matter, and what it brought home to his family, his own family, the four children and his wife, who have experienced untold economic hardships and failures because of this case, Judge.

His mother died, which wrought a great change in this man. He is not the same fellow that he was before, your Honor, back in 1954 and 1955, lost about 55 pounds while in jail, and there is no doubt in my mind, Judge, and I could go on with other things that I have here in my notes, although I don't think it is necessary in the face of what we have here, considering what his wife and family in their lives have gone through, and that has had the deterrent effect that would be necessary upon this defendant, and I am sure that if your Honor gives a lesser sentence here, if your Honor can see your way clear to do that and place him on probation for a period to commence at the expiration of the lesser offense, and with the 25-year sentence [fol. 34] hanging over his head, that I feel certain, Judge, he will never come in here again. Of course, your Honor heard this statement before, but I honestly feel sincere when I make this statement to your Honor, that it will keep him in the straight and narrow path, that he will not stray from it, and that he will come out and take care of his family as he should take care of his wife and rear his children properly. I have met the children on numerous occasions, Judge. Of course, anybody has compassion for the children and when they are hurt their heart bleeds for them, and I am making my plea to your Honor in all earnestness, and I make that not only for Donovan but for the family, Judge.

COURT'S RULING ON SENTENCE

The Court: All right. Well, needless to say, I have given a great deal of thought to this since the Court of Appeals concluded that I had the power to suspend the 25-year sentence, and I have concluded that I cannot in connection

with Donovan or Andrews do that; in other words, the two men who perpetrated the holdup of the truck. I think that they have to serve that sentence. That is a harsh sentence but eligibility for parole comes into play after one-
[fol. 35] third of the time is served if you maintain your record.

Now, you may have your hopes in that regard, but I do not have the least idea as to how it will turn out in that respect.

I am sorry to say I do not think I can suspend sentence and permit you to serve only the sentence that a person has to serve who has conspired but did not carry out the crime.

As to Mr. Cohen, I am somewhat unhappy with the choice that I regret that I have, that is, as to the five years or the 25 years. However, in your case I will take the chance and suspend the 25-year sentence. You have had a very good prison record. Frankly, if you had been with the other two on the truck I would not suspend your sentence. It seems to me that if there is any justification for a mandatory sentence, this is it, and although I dislike to do it Congress has decided that where a post office truck is held up there is to be no choice as to the sentence. If you had been there I would have imposed the same sentence, but it just so happens you were not and you were just about a hair's breadth away from the matter where some such evidence might have been shown.

[fol. 36] As I say, I will take the chance as to the 25-year sentence and I will suspend the execution of it and place you on probation for five years after the termination of your prison sentence.

Now, with respect to your disappointment, I give you a word of advice and that is don't allow your disappointment or your displeasure to show up in your prison records. In other words, keep on in your activities in prison and have your prison records as clean as it possibly can be.

Now, Mr. Cohen, don't you disappoint, because no matter how well you behave, in view of the seriousness of the crime, it may be in the cards, I don't say that it is or that it could be, but I am just cautioning you against doing anything that may spoil your future.

Mr. Friedman: If I may say one statement on the record, your Honor——

The Court: Yes.

Mr. Friedman: Do I take it that your Honor feels that with respect to the first count of the indictment your Honor does not have the power to impose that sentence?

[fol. 37] The Court: I would like to make that clear once and for all so that nobody has any hopes being built up or to be built up. I do not think I have any power to sentence only under that count, but even if I thought I had the power I would not execute it, so don't waste your time because, as I say, in the case of the two men who have committed the holdup, I don't recall that I ever had any doubt about it but that I would impose the sentence under Count 2. I always had it, and on the day of sentence as well.

Mr. Friedman: Not to detract from anything your Honor said, and, of course, I do not mean to inquire into your judicial conscience or anything like that, but if it had been permissible that Your Honor should impose or could impose not exceeding a 10-year sentence on the first one and suspend on the second, do I have, or it is my impression now—and if I am wrong in that if your Honor will please correct me—I have the impression that you might have imposed a lesser sentence because your Honor always considered the 25-year sentence as being harsh.

The Court: Yes, it is a harsh one, but, as I say——

Mr. Friedman: Not merely as to the co-defendant Cohen, [fol. 38] and may I not ask also as to the others, and I trust I am not transgressing any propriety in doing it, or in asking that if your Honor had the power to impose such a sentence where——

The Court: Now, Mr. Friedman, I am not going to stand cross-examination. I think we are through as far as sentence is concerned. I have ruled, and if there is anything else you wish to discuss I will hear you.

Mr. Friedman: I just wanted to note on the record just for the preservation of any rights which may be involved with respect to the defendants Andrews and Donovan that I note an exception to the ruling of the sentence imposed on the first count regardless of what disposition your Honor might have made.

The Court: I will call to the attention of whoever reads this record that there was no such intention expressed on my part until you asked me after sentence had been imposed, because my sentence would be exactly the same regardless of which count your remarks may be addressed to.

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[fol. 38a] Court reporter's certificate to foregoing transcript omitted in printing.

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[fol. 39] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

v.

ALBERT ANDREWS, Defendant.

ORDER REAFFIRMING JUDGMENT—May 29, 1957

A judgment having been entered herein against the above-named defendant on the 31st day of December, 1954, and an appeal having been taken from said judgment to the United States Court of Appeals for the Second Circuit, and the United States Court of Appeals having affirmed said judgment but remanded the cause for resentence on Count 2 of the indictment;

And the resentence on Count 2 of the indictment having come on to be heard on the 20th day of May, 1957, and after hearing Paul W. Williams, United States Attorney for the Southern District of New York, by Adelbert C. Matthews, Jr., Assistant United States Attorney, and Jacob W. Friedman, attorney for defendant on said resentence, and due deliberation having been had thereon, it is

Ordered, that the judgment dated the 31st day of December, 1954, entered herein, remain unchanged and in full force and effect.

Dated: New York, N. Y., May 29, 1957.

(Illegible), U. S. D. J.

[fol. 40] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

v.

ROBERT L. DONOVAN, Defendant.

ORDER REAFFIRMING JUDGMENT—May 29, 1957

A judgment having been entered herein against the above-named defendant on the 31st day of December, 1954, and an appeal having been taken from said judgment to the United States Court of Appeals for the Second Circuit, and the United States Court of Appeals having affirmed said judgment but remanded the cause for resentence on Count 2 of the indictment;

And the resentence on Count 2 of the indictment having come on to be heard on the 20th day of May, 1957, and after hearing Paul W. Williams, United States Attorney for the Southern District of New York, by Adelbert C. Matthews, Jr., Assistant United States Attorney, and Frank E. Healy, attorney for defendant on said resentence, and due deliberation having been had thereon, it is

Ordered, that the judgment dated the 31st day of December, 1954, entered herein, remain unchanged and in full force and effect.

Dated: New York, N. Y., May 29, 1957.

(Illegible), U. S. D. J.

[fol. 41] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

v.

ROBERT L. DONOVAN, Defendant.

MOTION TO VACATE ILLEGAL SENTENCE—Filed April 17, 1961

Comes now the defendant, Robert L. Donovan, and moves the Court to vacate the sentence of 25 years imposed on the 31st day of December, 1954 and affirmed after remand on the 29th day of May, 1957, in the above entitled case for the reason the defendant was not afforded an opportunity to make a statement in his own behalf as provided in Rule 32 (a), Federal Rules of Criminal Procedure, either at the time of the original sentence on December 31, 1954 or on the date of resentence after remand on May 29, 1957.

Wherefore, the defendant prays that the sentence aforesaid be vacated and he be resentenced in accordance with the Federal Rules of Criminal Procedure.

Robert L. Donovan, (Defendant).

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[fol. 42] MEMORANDUM IN SUPPORT OF MOTION

Statement of the Case

The defendant, with others, was convicted on a jury trial of conspiracy (18 U.S.C. 371) and violation of the Federal Mail Robbery Act (18 U.S.C. 2114). Sentences of 5 years on the conspiracy count and 25 years on the substantive offense were imposed. Said sentences were ordered to be concurrent.

Subsequently, the Court of Appeals remanded the case for consideration under 18 U.S.C. 3651. (242 F. 2d 61). The trial judge after a hearing on May 29, 1957, ordered

that the original sentence of 25 years imposed on December 31, 1954, "Remain unchanged and in full force and effect."

While the defendant's attorney spoke at some length at both the time of the original sentence and at the hearing on the remand, the defendant was not afforded an opportunity to speak in his own behalf at either proceeding.

## Argument

Rule 32 (a) in pertinent part provides:

> "Before imposing sentence the Court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment."

From the Record it is obvious that the Court did not comply with the express provisions of Rule 32(a) cited above and this omission may have been prejudicial to the defendant. This is especially so, in respect to the hearing for resentence after the order for remand. The Court of Appeals held that the provisions of 18 U.S.C. 3651 were applicable to the defendant at the discretion of the trial court. (242 F. 2d 61 at page 64). It is not outside the realm of possibility that the defendant, "with halting eloquence," may have swayed the judge into granting probation on Count III. Also, the defendant had a legal reason to put to the court relative to the legality of the mandatory sentence imposed on Count III.

[fol. 43] The defendant's right of allocution stems from the common law. See *Anonymous*, 3 Mod. 265, 266, 87 Eng. Rep. 175 (K.B.). However, as recently as February 27th of this year, the Supreme Court determined that Rule 32(a) defines a personal right which is not satisfied by a statement of counsel. In *Green* v. *United States*, 1961, 81 S Ct. 653, No. 70, October Term, 1960, Mr. Justice Frankfurter stated:

> Taken in the context of its history, there can be little doubt that the drafters of Rule 32(a) intended that the defendant be personally afforded the opportunity to speak before imposition of sentence. . . . The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting elo-

quence, speak for himself . . . We . . . reject the Government's contention that merely affording defendant's counsel the opportunity to speak fulfills the dual role of Rule 32(a)."

In the instant case, the mandatory provision of Section 2114 demanded that the defendant be granted every right due him under the law. A defendant, facing a mandatory sentence of 25 years, should be afforded every opportunity provided by law to personally plead his case for probation —as probation is the only alternative the Court has for the mandatory 25 years.

Conclusion

It is respectfully submitted that the defendant be afforded an opportunity to personally "make a statement in his own behalf" and "to present . . . information in mitigation" of his sentence.

Robert L. Donovan, (Defendant).

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[fol. 44] In United States District Court for the Southern District of New York

C 145-191

United States of America,

vs.

Robert L. Donovan

Proposed Motion Re Notice of Appeal

Comes now the defendant Robert L. Donovan, and respectfully moves that the Court order the Clerk to prepare and file a Notice of Appeal should the Court deny the motion under Rule 35, Federal Rules Criminal Procedure, now filed and pending in this Court in the above numbered cause.

This procedure is necessary owning to the ten day Rule for Notice of Appeal where the defendant is confined some 3000 miles from the Court.

Respectfully submitted, Robert L. Donovan, Box 1420, Alcatraz, California.

[fol. 45] 4/12/6-

From: Robert L Donovan, #1420 Alcatraz California

To: Office of the Clerk, U.S. District Court, Foley St. N.Y.

Re: U.S.A. v. Robert L Donovan Cr. 145-191

DEAR MR. OLEAR:

Thank you for your very kind and considerate letter and enclosures. I sincerly appreciate same.

Please file my motion to vacate under the provisions of Rule 35 Federal Rules Criminal Procedure.

I respectfully request that your office enter my Notice of Appeal in the event of denial, for I understand under Rule 35 I would have only 10 days to appeal.

Thanking you for your patience and kindness, I remain,

Respectfully yours, Robert L Donovan.

[fol. 46] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

vs.

ROBERT L. DONOVAN, Defendant.

SUPPLEMENT TO MOTION FILED UNDER RULE 35, FEDERAL RULES CRIMINAL PROCEDURE—Filed April 26, 1961

Comes now the defendant and submits the following citation of the Supreme Court in support of his motion under Rule 35 now pending in this Court:

*Van Hook* v. *United States*, No. 705, October Term, 1960, 81 S. Ct. 823.

> "The judgment is reversed and the case remanded for resentencing in compliance with Rule 32 of the Federal Rules of Criminal Procedure, 18 U. S. C. A. Green v. United States, 365 U.S. 301, 81 S. Ct. 653, 5 L. Ed. 2d 670."

Robert L. Donovan, (Defendant).

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[fol. 47] Certificate of service omitted in printing.

[fol. 48] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

against

ROBERT L. DONOVAN, Defendant.

MEMORANDUM ORDER DIRECTING RETURN OF DEFENDANT FOR RESENTENCING—June 16, 1961

Murphy, D. J.

Defendant's motion is granted and it is ordered that he be returned to this district for resentencing. Green v. United States, 365 U.S. 301. We have examined so much of the record in Van Hook v. United States, 365 U.S. 609, relating to the sentencing of that defendant and find that the prisoner was never asked whether he had anything to say pursuant to Rule 32(a) F.R.Crim.P. In examining the transcript of the proceedings before Judge Walsh insofar as they relate to defendant Donovan's sentencing, we are satisfied that at no time did Judge Walsh ask the defendant whether he had anything to say, although defendant's counsel was heard at length. We gather from *Green* and *Van Hook* this is not enough. Accordingly, it would appear that the defendant's right of allocution was denied him.

This is an order. No settlement is necessary.

[illegible], U. S. D. J.

Dated, New York, N. Y., June 16, 1961.

[fol. 49] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

v.

ROBERT L. DONOVAN, Defendant.

STATE OF NEW YORK,
COUNTY OF NEW YORK,
Southern District of New York, ss:

AFFIDAVIT IN OPPOSITION TO MOTION FOR RESENTENCING—Filed June 19, 1961

Arthur I. Rosett, being duly sworn, deposes and says:

I am an Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, and as such am in charge of the above-entitled matter and am familiar with the files of this office relating thereto.

This affidavit is made in opposition to the motion of Robert L. Donovan for resentencing, pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

The sole ground asserted by petitioner is that the sentence imposed upon him is illegal since he was not afforded an opportunity to make a statement in his own behalf and to present information in mitigation of punishment, as provided by Rule 32(a) of the Federal Rules of Criminal Procedure.

The petitioner was convicted on an indictment filed October 8, 1954. The first count of this indictment charges the petitioner, along with Albert Andrews and Hyman Cohen, with assaulting a Post Office employee who had lawful cus-[fol. 50] tody of mail, with intent to rob the mail, in violation of Title 18, United States Code, Section 2114. The second count charges a similar violation of Section 2114 but further alleges that in attempting to effect the robbery the

defendants put the life of the Post Office Department employee in jeopardy by use of a dengerous weapon, a loaded revolver. The third count charges a conspiracy to assault a Post Office employee with intent to rob him of the mail.

After a 5-day trial before Honorable Lawrence E. Walsh, and a jury, the three defendants were found guilty on all counts. Judgment of conviction was entered on December 31, 1954, sentencing each defendant to a term of 25 years imprisonment on the second count and a concurrent 5-year term on the third count. No sentence was imposed on the first count.

Attached hereto and made a part of this affidavit is a photostatic copy of the stenographic minutes of the sentencing.

On appeal, the Court of Appeals affirmed the judgments of conviction but remanded the case for resentence on the second count, holding that Judge Walsh may have erroneously believed that he had no power under 18 U.S.C. § 3651 to suspend sentence on that count. *United States* v. *Donovan*, 242 F. 2d 61 (2d Cir. 1957).

Judge Walsh resentenced the three defendants on May 20, 1957 on the second count. At that time Hyman Cohen received a suspended sentence on that count and the 25-year sentences were reimposed upon Donovan and Andrews.

Attached hereto and made a part of this affidavit is a photostatic copy of the stenographic minutes of these pro-
[fol. 51] ceedings before Judge Walsh on May 20, 1957. Petitioner appealed from the judgment on resentencing which was affirmed in open court. *United States* v. *Donovan and Andrews*, 252 F. 2d 788 (2d Cir.) *cert. denied* 358 U.S. 851 (1958). Subsequent Rule 35 proceedings by the co-defendant Andrews on issues other than those raised by this motion will not be set forth in detail here.

Although petitioner attacks the validity of both the 1954 sentencing and the 1957 resentencing it appears clear that he is presently incarcerated solely on the basis of the judgment of conviction entered by Judge Walsh on May 29, 1957. Since petitioner was resentenced at that time, it is unnecessary to consider any possible flaws in the original sentencing.

The principal authority relied upon by petitioner is the recent decision by the Supreme Court of the United States

in *Green* v. *United States*, 365 U.S. 301 (1961). There was no opinion of the Court in *Green*. Mr. Justice Frankfurter announced the judgment of the court in an opinion in which three other Justices joined. Mr. Justice Stewart concurred separately on independent grounds. The other four Justices dissented. In *Green* the Supreme Court affirmed the sentence imposed upon the petitioner. Because of the findings of fact made by the court, the four Justices, speaking through Mr. Justice Frankfurter, did not have occasion to consider Mr. Justice Stewart's position establishing a prospecting rule. Rather, the four Justices, speaking through Mr. Justice Frankfurter, found the record ambiguous as to whether the defendant had been explicitly afforded his right of allocution. This ambiguity, and the attendant circumstances, including defendant's fail- [fol. 52] ure to raise this point for a number of years, led these Justices to the conclusion that the petitioner had failed to show that the sentencing procedure was illegal. This opinion does not hold that were the sentencing defective it would be subject to collateral attack under Rule 35, Federal Rules of Criminal Procedure.

The circumstances of the May 20, 1957 resentencing make it equally clear that defendant was not deprived in this case of his opportunity to allocution.

After hearing legal argument from counsel, Judge Walsh ordered the defendants produced for resentencing (Tr. 12). At this point he inquired "is there anything you want to say now", whereupon counsel made statements before sentence, and at page 13 Mr. Friedman, Andrews' attorney said:

> "If your Honor please, Mr. Frank Healey is not present and he will also say something on behalf of the defendant Donovan and I will address a few remarks to your Honor with respect to the defendant Cohen and the defendant Andrews."

Mr. Healey did appear and made a lengthy statement on behalf of the petitioner (Tr. 16-21). These circumstances are almost identical to those in *Green* v. *United States*. There too the trial judge inquired "did you want to say something?" And there too the record did not indicate

to whom this remark was addressed. Mr. Justice Frankfurter said:

> [fol. 53] ". . . The single pertinent sentence—the trial judge's question "Did you want to say something? —may well have been directed to the defendant and not to his counsel. A record, certainly this record, unlike a play is unaccompanied with stage directions which may tell the significant cast of the eye or the nod of the head. It may well be that the defendant himself was recognized and sufficiently apprised of his right to speak and chose to exercise this right through his counsel. Especially is this conclusion warranted by the fact that the defendant has raised this claim seven years after the occurrence. The defendant has failed to meet his burden of showing that he was not accorded the personal right which Rule 32(a) guarantees, and we therefore find that his sentence was not illegal."

Petitioner's failure in this case to raise this point for four years must be viewed in the light of the extensive appellate and collateral litigation in which these defendants have engaged since 1957. Donovan prosecuted an appeal from this resentencing and sought certiorari from its affirmance. The volume of litigation has been great and the opportunities to raise this point, if in fact there had been some deprivation of right, were ample. As the Supreme Court's opinion in *Green* indicates, the right to allocution is not novel. It may be traced back as early as 1689. Anonymous, 3 Mod. 265, 266, 87 Eng. Rep. 175 (K.B.).

Petitioner also cites in support of his motion the Supreme Court's *per curiam* decision in *Van Hook* v. *United States*, 365 U.S. 609 The circumstances in that case are markedly dissimilar from those present here. *Van Hook* was a direct appeal from a criminal conviction in which the denial of allocution was raised by the defendant. Secondly, there was no ambiguity in the record as to the deprivation of right or any question of the waiver of that right by the [fol. 54] defendant. On the petition for certiorari, the United States of America confessed error, since it appeared

that neither the defendant nor his counsel were asked whether they had a statement before sentencing and therefore, the failure to comply with Rule 32(a) was apparent. It was on the basis of this confession of error that the Supreme Court granted certiorari and remanded the case for resentencing.

Whatever ambiguities may exist in the trial transcript must be assessed in the light of these circumstances.

At the time of sentencing petitioner was experienced in the ways of criminal courts. His record indicates that he had been convicted in at least seven previous criminal proceedings. This is not an inexperienced defendant, unfamiliar with criminal procedure and his rights thereunder.

Wherefore, it is respectfully prayed that the petitioner's motion for resentencing under Rule 35, be in all respects denied.

Arthur I. Rosett, Assistant U. S. Attorney.

Sworn to before me this 5th day of June, 1961.

Leo Cohen, Notary Public, State of New York.

Qualified in Kings County, No. 24-5742400.

Commission Expires March 30, 1962.

[fol. 55] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

v.

ROBERT L. DONOVAN, Defendant.

STAY ORDER—June 28, 1961

Upon the annexed affidavit of Arthur I. Rosett, Assistant United States Attorney for the Southern District of New York, duly sworn to on June 28, 1961, it is

Ordered, that the provision of the order of June 16, 1961 in the above-entitled matter requiring the return of Robert L. Donovan to the Southern District of New York for resentencing be and the same is stayed up to and including July 17, 1961.

Dated: New York, N. Y., June 28, 1961.

(Name illegible), U. S. D. J.

[fol. 56] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

v.

ROBERT L. DONOVAN, Defendant.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR STAY

STATE OF NEW YORK,
COUNTY OF NEW YORK,
Southern District of New York, ss:

Arthur I. Rosett, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, and as such am familiar with and in charge of the above-entitled matter.

2. This affidavit is made in support of the application of the United States of America for a stay of the order of the Honorable Thomas F. Murphy, United States District Judge, dated June 16, 1961, granting Robert L. Donovan resentencing.

3. Judge Murphy's memorandum orders that the defendant be returned to this District for resentencing. It is the intention of this office to take timely appeal from this order and to prosecute the same diligently in the United States Court of Appeals for the Second Circuit.

4. Under Rule 37(a)(2), Federal Rules of Criminal Procedure, an appeal by the Government may be taken within 30 days after the entry of judgment or order appealed from. It is the intention of the United States Attorney for the Southern District of New York to file a notice of appeal within this time upon receipt of formal authorization to appeal from the United States Department of Justice, Washington, D. C.

[fol. 57] Wherefore, it is respectfully prayed that the order of June 16, 1961 in the above-entitled matter be stayed up to and including July 17, 1961.

Arthur I. Rosett, Assistant United States Attorney.

Sworn to before me this 28th day of June, 1961.

Jack W. Ballen, Notary Public, State of New York.

No. 41-0146400, Queens County.

Term Expires March 30, 1963.

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[fol. 58] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

v.

ROBERT L. DONOVAN, Defendant.

NOTICE OF APPEAL—Filed July 14, 1961

Name of appellant: United States of America.

Name and address of appellant's attorney: Robert M. Morgenthau, United States Attorney for the Southern District of New York, United States Court House, Foley Square, New York 7, New York.

Offense: Assault of Post Office employee with lawful custody of mail with intent to rob with a dangerous weapon and conspiracy so to do. Title 18, United States Code, Sections 2114 and 371.

Order: Order of Honorable Thomas F. Murphy, entered in the Southern District of New York on June 16, 1961, granting motion for relief under Rule 35 F.R. Crim. P., on the ground that the trial judge failed to comply with Rule 32(a) F.R. Crim. P.

The above-named appellant hereby appeals to the United States Court of Appeals for the Second Circuit in the above-stated order.

Dated: New York, N.Y., July 13, 1961.

Robert M. Morgenthau, United States Attorney for the Southern District of New York, Attorney for Appellant, Office and Post Office Address: United States Court House, Foley Square, New York 7, N.Y.

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[fol. 58a] Affidavit of mailing (omitted in printing).

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[fol. 59] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES,

v.

ANDREWS

LETTER REQUESTING VACATION OF JUDGMENT AND ORDER THEREON—Filed July 19, 1961

Box No. P.M.B. 25668-N.E.
Lewisburg, Pennsylvania
June 25, 1961.

The Honorable Thomas F. Murphy,
United States District Court,
Southern District of New York,
U. S. Courthouse—Foley Square,
New York 7, N. Y.

DEAR SIR:

It is my understanding that this Honorable Court vacated the judgment of my codefendant, Robert L. Donovan, on June 16, 1961, because his right of allocution was denied him. Rule 32(a) of the Federal Rules of Criminal Pro-

cedure; Green v. United States, 365 U.S. 301; and Van Hook v. United States, 365 U.S. 609.

Since the identical circumstances exist with me, I very respectfully request that this Honorable Court vacate my judgment. Thank you.

Respectfully submitted, Albert Andrews, #25668-N.E.

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[fol. 60] July 18, 1961.

Motion granted.
Let the defendant be resentenced.

Thomas F. Murphy, U. S. D. J.

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[fol. 61] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

v.

ALBERT ANDREWS, Defendant.

STATE OF NEW YORK,
COUNTY OF NEW YORK,
Southern District of New York, ss:

AFFIDAVIT IN OPPOSITION TO LETTER REQUESTING VACATION OF JUDGMENT—Filed July 19, 1961

Arthur I. Rosett, being duly sworn, deposes and says:

I am an Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, and as such I am in charge of the above-entitled matter and am familiar with the facts thereof.

This affidavit is made in opposition to a letter of Albert Andrews to the Honorable Thomas F. Murphy, dated June 25, 1961, in the nature of an application to vacate the sentence under Title 28, United States Code, Section 2255.

As is indicated in this letter, petitioner Andrews was a co-defendant of and was sentenced at the same time as Robert L. Donovan. The factual and legal posture of this application therefore is identical to the similar motion of Robert L. Donovan. Incorporated herein as part of the Government's opposition to this application is the affidavit of Arthur I. Rosett, Assistant United States Attorney for [fol. 62] the Southern District of New York, duly sworn to on June 5, 1961, and attached photostatic copies of the stenographic transcript of the proceedings before the Honorable Lawrence E. Walsh, United States District Judge, at which both Donovan and the petitioner Andrews were sentenced.

Wherefore, it is respectfully prayed that the application of Albert Andrews to vacate the sentence under Title 28, United States Code, Section 2255, in all respects be denied.

Arthur I. Rosett, Assistant U. S. Attorney.

Sworn to before me this 30 day of June, 1961.

Jack W. Ballen, Notary Public, State of New York.

No. 41-0146400, Queens County.

Term Expires March 30, 1963.

[fol. 63] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

v.

ALBERT ANDREWS, Defendant.

NOTICE OF APPEAL—Filed July 31, 1961

Name of Appellant: United States of America.

Name and Address of Appellant's Attorney: Robert M. Morgenthau, United States Attorney for the Southern District of New York, United States Court House, Foley Square, New York 7, New York.

Offence: Assault of Post Office employee with lawful custody of mail with intent to rob with a dangerous weapon and conspiracy so to do. Title 18, United States Code, Sections 2114 and 371.

Order: Order of the Honorable Thomas F. Murphy entered in the Southern District of New York on July 18, 1961, granting motion for relief under Title 28, United States Code, Section 2255 on the ground that the trial judge failed to comply with Rule 32(a) F.R.Cr.P.

The above named appellant hereby appeals to the United States Court of Appeals for the Second Circuit in the above stated order.

Dated: New York, N. Y., July 31, 1961.

Robert M. Morgenthau, United States Attorney for the Southern District of New York, Attorney for Appellant, Office and Post Office Address: United States Court House, Foley Square, New York 7, N. Y.

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[fol. 63a] Proof of Service (omitted in printing).

[fol. 64] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

v.

ALBERT ANDREWS, Defendant.

NOTICE OF MOTION FOR STAY—Filed August 1, 1961

SIR:

Please Take Notice, that upon the enclosed affidavit of Arthur I. Rosett, duly sworn to on the 31st day of July, 1961, upon all the proceedings heretofore had herein, the United States of America will move this Court at a stated term thereof for the hearing of motions in criminal causes to be heard in Room 318 of the United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 7th day of August, 1961, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for a stay of the provision of the order of the Honorable Thomas F. Murphy, United States District Judge, in the above-entitled matter, requiring the return of Albert Andrews to the Southern District of New York for resentencing up to and including the time of the disposition of the appeal now pending from the above-mentioned order in the United States Court of Appeals for the Second Circuit, and for such other and further relief as the Court may deem just and proper.

Dated: New York, N.Y., July 31, 1961.

Yours, etc. Robert M. Morgenthau, United States Attorney for the Southern District of New York, Attorney for U.S.A., Office and P. O. Address: United States Court House, Foley Square, New York 7, N.Y. Telephone: COurtlandt 7-7100

To: Albert Andrews, Box P.M.B. 25688-N.E., Lewisburg, Pennsylvania.

[fol. 65] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

v.

ALBERT ANDREWS, Defendant

AFFIDAVIT IN SUPPORT OF APPLICATION FOR STAY—
July 31, 1961

STATE OF NEW YORK,
COUNTY OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, ss:

Arthur I. Rosett, being duly sworn deposes and says:

1. I am an Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, and as such am familiar with and am in charge of the above-entitled matter.

2. This affidavit is made in support of the motion of the United States of America for a stay of the order of the Honorable Thomas F. Murphy, United States District Judge, dated July 18, 1961, granting Albert Andrews resentencing.

3. On July 31, 1961 a notice of appeal was filed by the United States of America from this order. It is the intention of the United States of America to diligently prosecute this appeal in the United States Court of Appeals for the Second Circuit.

4. The issues presented on this appeal are substantial, and in fact, are indentical to those presented in *Hill* v. *United States* and *Machibroda* v. *United States*,

5. Unless Judge Murphy's order is stayed, the proceed-
[fol. 66] ings will be mooted and the Government will be denied appellate review of the substantial legal issues.

Wherefore, it is respectfully prayed that the order of July 18, 1961 in the above-entitled matter be stayed up to

and including the time of the disposition of the appeal now pending before the United States Court of Appeals for the Second Circuit.

Sworn to before me this 31st day of July, 1961.

Arthur I. Rosett, Assistant U. S. Attorney

Leo Cohen, Notary Public, State of New York.

Qualified in Kings County, No. 24-5742400.

Commission Expires March 30, 1962

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[fol. 66a] Affidavit of Mailing (omitted in printing).

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[fol. 67] Respectfully referred to Judge Murphy.

William B. Herland, USDJ.

Aug. 8, 1961.

Motion granted.

Thos F. Murphy, USDJ.

[fol. 68] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

v.

ROBERT L. DONOVAN, Defendant.

NOTICE OF MOTION FOR STAY—Filed August 1, 1961

SIR:

Please Take Notice, that upon the enclosed affidavit of Arthur I. Rosett, duly sworn to on the 31st day of July, 1961, upon all the proceedings heretofore had herein, the United States of America will move this Court at a stated term thereof for the hearing of motions in criminal causes to be heard in Room 318 of the U. S. Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 7th day of August, 1961, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for a stay of the provision of the order of the Honorable Thomas F. Murphy, United States District Judge, in the above entitled matter, requiring the return of Robert L. Donovan to the Southern District of New York for re-sentencing up to and including the time of the disposition of the appeal now pending from the above-mentioned order in the United States Court of Appeals for the Second Circuit, and for such other and further relief as the Court may deem just and proper.

Dated: New York, N. Y., July 31, 1961.

Yours, etc. Robert M. Morgenthau, United States Attorney for the Southern District of New York, Attorney for U.S.A., Office and P. O. Address: United States Court House, Foley Square, New York 7, N.Y. Telephone: COurtlandt 7-7100.

To: Robert L. Donovan, Box 1420, Alcatraz, California.

[fol. 69] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

v.

ROBERT L. DONOVAN, Defendant.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR STAY—July 31, 1961

STATE OF NEW YORK,
COUNTY OF NEW YORK,
Southern District of New York, ss:

Arthur I. Rosett, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, and as such am familiar with and am in charge of the above-entitled matter.

2. This affidavit is made in support of the motion of the United States of America for a stay of the order of the Honorable Thomas F. Murphy, United States District Judge, dated June 16, 1961, granting Robert L. Donovan re-sentencing.

3. On July 14, 1961, a notice of appeal was filed by the United States of America from this order. It is the intention of the United States of America to diligently prosecute this appeal in the United States Court of Appeals for the Second Circuit.

4. The issues presented on this appeal are substantial, and in fact, are identical to those presented in *Hill* v. *United States* and *Machibroda* v. *United States*, as to which writs of certiorari have been granted by the Supreme Court of the United States, 365 U.S. 841, 842.

5. Unless Judge Murphy's order is stayed, the pro-
[fol. 70] ceedings will be mooted and the Government will be denied appellate review of the substantial legal issues.

Wherefore, it is respectfully prayed that the order of June 16, 1961 in the above-entitled matter be stayed up to and including the time of the disposition of the appeal now pending before the United States Court of Appeals for the Second Circuit.

Sworn to before me this 31st day of July, 1961.

Arthur I. Rosett, Assistant U. S. Attorney.

Leo Cohen, Notary Public, State of New York.

Qualified in Kings County, No. 24-5742400.

Commission Expires March 30, 1962.

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[fol. 70a] Affidavit of Mailing (omitted in printing).

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[fol. 71] August 7, 1961.

Respectfully referred to Judge Murphy.

William B. Herland, USAJ.

Aug. 8, 1961.

Motion granted.

(Name illegible), USAJ.

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[fol. 72] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 73] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

C 145-191

UNITED STATES OF AMERICA, Appellant,

v.

ROBERT L. DONOVAN, Appellee.

NOTICE OF MOTION TO DISMISS APPEAL—July 26, 1961

SIRS:

Please Take Notice that upon the annexed motion and upon all the proceedings had theretofore in the above-entitled cause, the undersigned will move this Court, on a motion day thereof, to be held in the Federal Court Building, Foley Square, New York City, on the 7th day of August, 1961, for an order dismissing the appeal taken by the Government from an order of the District Court for the Southern District of New York in the above-entitled cause, on the ground that the District Court's order is not appealable.

Dated: July 26, 1961.

Yours, etc., /s/ Robert L. Donovan, pro se. Post Office Address: Box No. 1420, Alcatraz, California.

Copy to: United States Attorney, Southern District of New York, Federal Court Building, Foley Square, New York City.

[fol. 74] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

C. 145-191

UNITED STATES OF AMERICA, Appellant,

v.

ROBERT L. DONOVAN, Appellee.

MOTION TO DISMISS APPEAL—Filed August 9, 1961

May It Please the Court:

Comes now Robert L. Donovan, appellee in the above-entitled cause, who moves this Court to dismiss the appeal taken by the Government from a decision of the United States District Court for the Southern District of New York, on the ground that said decision is not appealable by the Government.

Facts

Appellee moved the District Court under Rules 35 and 32(d) of the Federal Rules of Criminal Procedure to have his sentence set aside as illegal because of the failure to afford him allocution pursuant to the interpretation of Rule 32(d) in a recent United States Supreme Court decision. The motion was granted on June 16, 1961 and appellee was ordered returned to the sentencing court for resentence. The Government appealed, Notice of Appeal dated July 13, 1961.

Jurisdiction

The jurisdiction of this Court to rule on the instant motion is invoked under Rules 4(b) and 19(d)(b) of this Court, and Rule 56, F.R. Crim. P., 18 U.S.C.

Argument & Law

The order of the District Court is not appealable by the Government. 18 U.S.C. Sec. 3731, United States v. Shapiro, 7 Cir. 1955, 222 F.2d 836.

[fol. 75] A direct attack was made on the sentence in the Court below. The attack was made by motion pursuant to Rules 35 and 32(d), F.R. Cr.P. No civil action was

taken, (such as 28 U.S.C. 2255, or under the All Writs Act, 28 U.S.C.) This is and was purely a criminal action.

Only in two instances can the Government appeal a criminal case to the Court of Appeals, (1) dismissal of an indictment or any count thereof, and (2) from a decision arresting a judgment of conviction. 18 U.S.C. 3731.

For the same reasons set forth in United States v. Shapiro, supra, concerning the appealability by the Government of a motion granted a defendant under Rule 32(d), F.R. Cr.P., the motion made by appellee herein under Rules 35 and 32(d) is not appealable. In *Shapiro*, a motion was made to withdraw a four-year-old guilty plea. Motion granted. When the Government appealed, defendant moved to dismiss appeal since the decision was not appealable. The Court of Appeals ruled that it was not an appealable decision, stating, at page 839,

> "The motion constituted a direct attack on the defendant's conviction in the original criminal case."

The arguments in *Shapiro* should apply with even more force in the case at bar since the order being appealed from herein is such less of a "final judgment" than that in *Shapiro*. As in *Shapiro*, appellee did not attack his conviction collaterally; he made a direct attack on the sentence. The conviction still stands, and he is to be resentenced by the trial judge.

Conclusion

Wherefore, this motion should be granted and the appeal taken by the Government from the District Court's order should be dismissed since the order is not appealable.

Respectfully submitted, /s/ Robert L. Donovan, pro se.

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[fol. 76] Consideration of the motion to dismiss is deferred until argument of the appeal.

H.J.F., U.S.C.J.

9 August 1961.

[File endorsement omitted.]

[fol. 77] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

C 145-191

ALBERT ANDREWS, Appellee,

v.

UNITED STATES OF AMERICA, Appellant.

MOTION TO TRANSFER ALBERT ANDREWS TO FEDERAL DETENTION HEADQUARTERS—Filed August 9, 1961

To the Chief Justice and the Associate Justices of the U.S. Court of Appeals for the Second Circuit:

My sentence was vacated by the Honorable Thomas F. Murphy, U. S. District Judge for the Southern District of New York, on July 18, 1961, because my right of allocation was denied.

The Government, however, intends to appeal Judge Murphy's decision to this Court. Therefore, I respectfully move this Court to issue an order, remanding me forthwith to the Federal Detention Headquarters, 427 West Street, New York City, until a decision is rendered by this Court. The reasons being: to speedily obtain the necessary citations and law books; to study federal criminal law and procedure; to prepare the Reply Brief; to consult counsel; etc. Unless this motion is granted, I will be extremely handicapped.

Wherefore, the appellee respectfully prays that this Honorable Court will issue the necessary order, granting the requested relief.

Respectfully submitted, /s/ Albert Andrews, #25668.

Dated: July 25, 1961.

To: Office of the Clerk, U.S. Court of Appeals, for the Second Circuit, U.S. Courthouse—Foley Square, New York 7, N. Y. United States Attorney, Southern District of New York, U.S. Courthouse—Foley Square, New York 7, N.Y.

Office of the Warden, United States Penitentiary, Lewisburg, Pennsylvania.

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[fol. 78] Motion Denied.

H.J.F., U.S.C.J.

August 9, 1961.

[File endorsement omitted.]

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[fol. 79] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Present: Hon. Henry J. Friendly, Circuit Judge.

ALBERT ANDREWS, Appellee,

v.

UNITED STATES OF AMERICA, Appellant.

ORDER DENYING MOTION TO TRANSFER—August 9, 1961

A motion having been made herein by appellant pro se to be transferred to Federal Detention Headquarters in New York City, New York,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

A. Daniel Fusaro, Clerk.

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[fol. 80] [File endorsement omitted.]

[fol. 81] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Present: Hon. Henry J. Friendly, Circuit Judge.

UNITED STATES OF AMERICA, Plaintiff-Appellant,

v.

ROBERT L. DONOVAN, Defendant-Appellee.

ORDER DEFERRING CONSIDERATION OF MOTION TO DISMISS APPEAL—August 9, 1961

A motion having been made herein by appellee pro se to dismiss the appeal for lack of jurisdiction,

Upon consideration thereof, it is

Ordered that consideration of said motion be and it hereby is deferred until the argument of the appeal.

A. Daniel Fusaro, Clerk.

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[fol. 82] [File endorsement omitted]

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[fol. 83] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

C 145-191

ALBERT ANDREWS, Appellee,

v.

UNITED STATES OF AMERICA, Appellant.

NOTICE OF MOTION FOR BAIL—August 25, 1961

SIR:

Please Take Notice that on the annexed motion and upon all the proceedings heretofore had herein, Albert Andrews, the appellee will move this Court at a stated term hereof

for the hearing of motions in criminal cases, appointed to be held at the United States Courthouse, Foley Square, Borough of Manhattan, New York City, on the 28th day of August, 1961, at 10:30 a.m., or as soon thereafter that the Court may set, for an order dismissing the appellant's appeal or admitting the appellee to bail on his own recognizance, pursuant to Rule 19 (a) of this Court's rules and Rule 47 of the Federal Rules of Criminal Procedure; and for such other, further, and different relief as to this Court may appear just.

Dated: August 25, 1961.

Respectfully submitted, Anne Andrews (sister of appellee), 705 East Fifth Street, New York 9, New York.

To: Office of the Clerk, United States Court of Appeals, for the Second Circuit, U. S. Courthouse, Foley Square, New York 7, New York. United States Attorney, Southern District of New York, U. S. Courthouse, Foley Square, New York 7, New York. Office of the Warden, Lewisburg, Pa.

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[fol. 84] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

C 145-191

ALBERT ANDREWS, Appellee,

v.

UNITED STATES OF AMERICA, Appellant.

MOTION TO DISMISS THE APPEAL AND MOTION FOR BAIL—Filed August 31, 1961

To The Chief Justice and the Associate Justices of the United States Court of Appeals for the Second Circuit.

The motion of Albert Andrews respectfully shows:

1. I am the sister of the appellee, Albert Andrews, who is a citizen of the United States of America by birth; and that he is presently confined in the Federal Penitentiary of Lewisburg, Pennsylvania;

2. That he did forward a hand-written copy of this motion to me; and he did request that it be typed, notarized, mailed, and filed in his behalf;

3. Appellee respectfully moves this Court for an order, dismissing the appellant's appeal or admitting the appellee to bail on his own recognizance;

4. The jurisdiction of this Court is invoked pursuant to Rule 19 (a) of this Court's rules and Rule 47 of the Federal Rules of Criminal Procedure;

5. Appellant appeals for an Order of the Honorable Thomas F. Murphy, entered in the U. S. District Court for the Southern District of New York on July 18, 1961, granting appellee's motion because his right of allocution was denied him;

6. Appellee neither requested nor desires that the said motion be treated under Title 28, United States Code, Section 2255, as indicated by the appellant in its Notice of Appeal, filed on July 31, 1961. Appellee requests and desires that the said motion be treated under Rule 35 of the [fol. 85] Federal Rules of Criminal Procedure, which is the *proper* remedy. See *Green* v. *United States*, 365 U. S. 301, 81 S. Ct. 653, 5 L. Ed. 2d 670. *This is a Criminal case, not a civil case;*

7. Appellee contends that (1) the said Order of the District Court is not appealable to this Court by the United States Government; and (2) the appellee is entitled to be admitted to bail on his own recognizance;

8. The Court's attention is directed to these relevant excerpts from Title 18, United States Code, Section 3731; "An appeal may be taken by and on behalf *on* the United States from the district courts to a court of appeals *in all criminal cases* in the following instances; From a decision or judgment setting aside, or dismissing any indictment or information or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section; From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section; Pending the prosecution and determination of the appeal in the foregoing instances, the defendant *shall* be admitted to bail on his own recognizance.

9. In sum, the United States Government can appeal a

criminal case to this Court *only* in the following instances; (1) a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof; and (2) a decision arresting a judgment of conviction.

10. It is crystal clear that the United States Government cannot *legally* appeal Judge Murphy's decision to this Court (Cf. United States v. Shapiro, 7 Cir. 1955, 222 F. 2d 836); and that the appellee is entitled to be admitted to bail on his own recognizance.

11. This action is taken in good faith; he believes it to be meritorious; he is entitled to redress; and h*is* is now entitled to the relief sought.

12. That no previous application has ever been made to this or any other Court for the relief sought herein.

13. All statements herein are true and correct to the best of his knowledge and belief.

[fol. 86] 14. I, Anne Andrews, do hereby certify that I served copies of the foregoing motion on the Clerk of the United States Court of Appeals for the Second Circuit; the United States Attorney for the Southern District of New York; and the Warden of the Federal Penitentiary at Lewisburg, Pa. by mailing copies thereof in duly addressed envelopes, with postage pre-paid, on this 25 day of August, 1961.

Wherefore, the appellee respectfully prays that this Honorable Court will issue the necessary order, granting the requested relief.

Dated: August 25th, 1961.

Respectfully submitted, Anne Andrews, Sister of Appellee 705 East Fifth Street, New York 9, New York.

County of Queens,
State of New York, ss:

Subscribed and sworn to before me this 25th day of August, 1961.

David Feld, Notary Public, State of New York.

No. 41-6258550.

Qualified in Queens County.

Term Expires March 30, 1962.

[fol. 87] The motion for bail is denied.

The motion to dismiss the appeal is adjourned until the argument of the appeal.

H.J.F. U.S.C.J.

30 August 1961

[File endorsement omitted.]

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[fol. 88] In United States Court of Appeals, Second Circuit

Present: Hon. Henry J. Friendly, Circuit Judge.

United States of America, Plaintiff-Appellant,

v.

Albert Andrews, Robert L. Donovan, Defendants-Appellees,

Hyman Cohen, Defendant.

Order Denying Motion for Bail and Adjourning Motion to Dismiss Appeal—August 31, 1961

A motion having been made herein by appellee, Albert Andrews, pro se to dismiss the appeal and/or to admit the appellee to bail on his own recognizance,

Upon consideration thereof, it is

Ordered that the motion for bail be and it hereby is denied.

Further ordered that the motion to dismiss the appeal be and it hereby is adjourned until the argument of the appeal.

A. Daniel Fusaro, Clerk.

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[fol. 89] [File endorsement omitted.]

[fol. 90] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Re: C 145-191

UNITED STATES OF AMERICA,

v.

ROBERT L. DONOVAN.

APPLICATION FOR BAIL—Filed October 23, 1961

The Defendant moved the Court below under the Fed. Rules Criminal Proc. relying on Rule 35 and 32(a) to set aside his sentence from a criminal conviction as illegal.

On June 16, 1961 the District Court ordered the sentence set aside and defendant brought to the Court for resentencing.

The defendant thereafter made application for Bail which on September 12, 1961 the Honorable Thomas Murphy, District Judge denied.

On July 14, 1961, the Government filed Notice of Appeal 28 days after the District Courts order, obviously pursuant to the time limits prescribed in Criminal Appeals Rule [fol. 91] 37 (a) (2) Fed. Rules Crim. Proc. Sec. 3731 Title 18 U.S.C. "Appeal by the United States" reads in part:

> "The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted."

On or about July 9, 1961, defendant-appellee moved the Court of Appeals to dismiss the appeal as an non-appealable order.

On July 16, 1961 the Government moved the District Court for a stay of its order to resentence defendant.

On July 31, 1961 before receiving defendants-appellee's reply to above motion for stay, the District Court granted the stay.

On August 16, 1961 Defendant-Appellee received the District Courts Ruling on Government's motion for stay and

wrote a letter to the District Court Judge to reconsider in the light of defendants reply and distance from Court. [fol. 92] On August 9, 1961 Judge Friendly of the Second Circuit ruled on defendant-appellee's motion to dismiss the appeal "deferred until Governments argument of appeal." Since the Government seems to rely on certain cases pending in the U.S. Supreme Court (see Governments motion for stay) obviously it cannot "diligently prosecute" the appeal.

Therefore, this being strictly a criminal proceeding and defendant claiming he will be released for legal reasons which he will state at re-sentencing time, defendant is entitled by statute to be admitted to bail on his own recognizance pending Government's appeal from 18 U.S.C. Section 3731:

> "Pending the prosecution and determination of appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance."

The word "shall" makes it mandatory that defendant be bailed pending appeal, even though the appeal is being diligently prosecuted, which it cannot be because of the Government's position as stated in its motion for stay. [fol. 93] Wherefore, this application should be granted by reason of statute as above stated.

Respectfully, Robert L. Donovan, pro se.

Dated September 21, 1961.

Proof of Service

I, Robert L. Donovan, certify that I mailed a copy of the foregoing Application for Bail to the U.S. Attorney for the Southern District of New York on the above date.

Robert L. Donovan, pro se.

[fol. 94] Motion for bail pending appeal denied.

C.E.C., S.R.W., L.P.M., U.S.C.J.J.

October 23, 1961

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[File endorsement omitted.]

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[fol. 95] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellant,

v.

ROBERT L. DONOVAN, Defendant-Appellee.

AFFIDAVIT IN OPPOSITION TO APPLICATION FOR BAIL—Filed October 23, 1961

STATE OF NEW YORK,
COUNTY OF NEW YORK,
Southern District of New York, ss:

Arthur I. Rosett, being duly sworn, deposes and says:

I am an Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, and as such am in charge of the above-entitled appeal.

This affidavit is made in opposition to the application of Robert L. Donovan for bail and release on his own recognizance pending disposition of the appeal now pending upon this Court. On September 12, 1961, Thomas F. Murphy, United States District Judge, denied a similar application by Robert L. Donovan in the District Court. This Court has denied a similar application by Albert Andrews, Donovan's codefendant, and an application for bail on the same ground was denied by the Honorable John Marshal Harlan as Circuit Justice on September 20, 1961.

The orders appealed from by the Government order Do-

novan's and Andrews re-sentencing on the ground that at the time of the original sentence, the Judge did not inquire whether they had anything to say before imposing sentence. As indicated in the Government's brief on the mer-
[fol. 96] its, heretofore filed with this Court, this appeal is not founded on Title 18, United States Code, Section 3731 and the bail provisions of that section do not apply.

Were this Court to find that the order of the District Court is not appealable or should be affirmed, Donovan would be entitled only to be brought back to the District Court for re-sentencing. There is no question in this proceeding of the validity of the judgment of conviction. Thus there is no occasion to interrupt the serving of sentence.

The Government has diligently prosecuted this appeal, has docketed the record, filed its brief, and is prepared to argue its cause.

Wherefore, it is respectfully prayed that the application of Robert L. Donovan for enlargement on bail for release of his own recognizance, in all respects, be denied.

Arthur I. Rosett, Assistant United States Attorney.

Sworn to before me this day of October, 1961.

Jack W. Ballen, Notary Public, State of New York.

No. 41-0146400, Queens County.

Term Expires March 30, 1963.

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[fol. 97] [File endorsement omitted.]

[fol. 98] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Present: Hon. Charles E. Clark, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellant,

v.

ALBERT ANDREWS, ROBERT L. DONOVAN,
Defendants-Appellees

HYMAN COHEN, Defendant.

ORDER DENYING APPLICATION FOR BAIL—October 23, 1961

A motion having been made herein by appellant pro se for bail pending appeal,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 99] [File endorsement omitted.]

[fol. 100] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 132—September Term, 1961

Submitted December 8, 1961

Docket No. 27135

UNITED STATES OF AMERICA, Appellant,

v.

ROBERT L. DONOVAN and ALBERT ANDREWS,
Defendants-Appellees.

Before: Waterman, Smith and Marshall, Circuit Judges.

OPINION—Decided March 23, 1962

Petitioners, who had been convicted in 1954, sentenced then to twenty-five years imprisonment and thereafter resentenced in 1957 to the same terms, petitioned in 1960, independently of each other, for further resentencing on the ground that their rights of allocution under Rule 32, Fed. Rules Crim. Proc., had been denied them. Their motions having been granted, United States District Court for the Southern District of New York, Murphy, J., the Government appealed. Both orders are reversed and causes remanded with instructions to dismiss the petitions.

Robert M. Morgenthau, U. S. Attorney, Southern District of New York (Arthur I. Rosett, Sheldon H. Elsten, Asst. U. S. Attorneys, of counsel), for Appellant.

[fol. 101] Robert L. Donovan, pro se., Annie Andrews, for Albert Andrews, pro se.

WATERMAN, Circuit Judge:

Robert L. Donovan and Albert Andrews were convicted in 1954 for having violated 18 U.S.C. § 2114, and twenty-five year terms of imprisonment were imposed upon them. See

*U. S.* v. *Donovan*, 242 F. 2d 61 (2 Cir. 1957). As a result of Donovan's appeal he and Andrews in 1957 were resentenced to serve the same twent-five year terms. Upon appeal the imposition of these sentences was affirmd. *U. S.* v. *Donovan and Andrews*, 252 F. 2d 788 (2 Cir.), *cert. denied* as to *Donovan*, 358 U. S. 851 (1958); as to Andrews, 358 U. S. 940 (1958).

Alleging that he had not been afforded an opportunity to make a statement in his own behalf prior to the imposition of sentence Donovan in 1960 applied to the sentencing court to have his sentence set aside. The application was entitled: "Motion to vacate illegal sentence, pursuant to Rule 32(a) and Rule 35, Federal Rules of Criminal Procedure."[1]

> (a) Sentence. * * * Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

The pertinent part of Rule 35 is as follows:

> The court may correct an illegal sentence at any time.

The undisputed facts are that when the case was called for sentence Donovan was present with his retained counsel; that the court inquired: "Is there anything you want to say now?"; and that thereupon in the presence of Donovan his counsel addressed the court at length.

[fol. 102] Though the trial judge found the facts to be as stated, Donovan's motion was granted. The court below held that statements made to the court by counsel were not enough and that Donovan's personal right of allocution under Rule 32(a) had been denied him. The court ordered that Donovan be brought from Alcatraz to the United States District Court for the Southern District of New York for resentencing. From this order the Government filed a Notice of Appeal, the docket entry being: "Filed Notice of Appeal by United States Attorney from order of Judge Murphy granting defendant Donovan's motion under Rule No. 35."

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[1] The pertinent part of Rule 32(a) is:

It is clear from the decision in *Hill* v. *United States*, handed down January 22, 1962, —— U. S. ——, 82 S. Ct. 468, that it was error to have granted the motion.

However, before reversing the court below we have been asked to rule upon whether we have jurisdiction of the Government's appeal. Donovan's motion was treated below as a motion under Rule 35, Fed. Rules Crim. Proc., and he has maintained that the Government may not appeal from an adverse ruling upon a petition so brought. Be that as it may, the decision in *Hill* v. *United States*, *supra*, holds that the motion, if based upon Rule 35, was improperly grounded upon that rule, for petitioner does not complain that the sentence itself is an illegal one but complains that the sentencing court, *prior* to the imposition of sentence, denied him his right to address the court. As stated in the majority opinion in *Hill*, *supra* at——

> But, as the Rule's language and history make clear, the narrow function of Rule 35 is to permit correction at any time of an illegal *sentence*, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence. The sentence in this case was not illegal. The punishment meted out was not in excess of that prescribed by the relevant statutes, [fol. 103] multiple terms were not imposed for the same offense, nor were the terms of the sentence itself legally or constitutionally invalid in any other respect.

After he learned of the success Donovan had obtained Andrews filed an informal motion seeking the vacation of his sentence on the ground that he, too, had been denied his right of allocution. His motion was treated as a motion for collateral relief brought under 28 U. S. C. §2255; and the court held, as in the case of Donovan, that rule 32(a) had not been complied with, and ordered that Andrews be produced for resentence. The Government appealed.

Under the holding in *Machibroda* v. *United States*, decided February 19, 1962, —— U. S. —— (1961), 82 S. Ct. 510, we reverse the order of the district court entered upon the petition of Andrews. The Supreme Court there said:

> For the reasons stated in Hill v. United States, 368 U. S. ——, 82 Ct. 468, we hold that the failure of the District Court specifically to inquire at the time of

sentencing whether the petitioner personally wished to make a statement in his own behalf is not of itself an error that can be raised by motion under 28 U. S. C. §2255 or Rule 35 of the Federal Rules of Criminal Procedure.

After the Government's appeal had been perfected Andrews requested us to treat his petition as one brought under Rule 35 of the Federal Rules of Criminal Procedure in order to raise the doubts as to our appellate jurisdiction that Donovan had raised.

The United States, to be sure, is without any general appellate remedy from decisions adverse to it in criminal cases except to obtain review of adverse rulings contained within the purview of 18 U. S. C. § 3731.

[fol. 104] However, the insistence of the appellees that we should not take any appellate jurisdiction here is mistakenly based on the proposition that the district judge could have properly granted the resentencings under Rule 35. We have pointed out that Rule 35 has no application whatever to a petition based upon a failure to comply with Rule 32(a).

These motions were independent motions and treatable as such. They were not directed at obtaining any review of any judgment of criminal culpability or illegality of sentence. We hold that the Government is not barred from seeking review of the lower court orders. See *Carroll* v. *United States*, 354 U. S. 394, 403 (1957). If necessary to label the applications at all they are best labeled as petitions brought under 28 U. S. C. §2255 for it would be under that statute that meritorious claims of violations of Rule 32(a) would be entertainable. It would be correct to do so. In this area adjudication upon the underlying merits of claims is not hampered by reliance upon the titles petitioners put upon their documents. See *Hill* v. *United States*, *supra*. The Government is not prevented from appealing adverse decisions upon such petitions. 28 U. S. C. §2255, para. 6; 28 U. S. C. §2253.

Therefore, we take appellate jurisdiction of both of the government appeals, reverse both orders below, and direct that both petitions be dismissed by the district court.

MARSHALL, Circuit Judge (concurring): I concur in the result.

[fol. 105] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Present: Hon. Sterry R. Waterman, Hon. J. Joseph Smith, Hon. Thurgood Marshall, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellant,

v.

ALBERT ANDREWS, ROBERT L. DONOVAN, Defendants-Appellees,

HYMAN COHEN, Defendant.

JUDGMENT—March 23, 1962

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and it hereby is reversed and that the action be and it hereby is remanded with directions that both petitions be dismissed by the said District Court in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk.

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[fol. 106] [File endorsement omitted.]

[fol. 107] IN UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

Present: Hon. Sterry R. Waterman, Hon. J. Joseph Smith, Hon. Thurgood Marshall, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellant,

v.

ALBERT ANDREWS, ROBERT L. DONOVAN, Defendants-Appellees,

HYMAN COHEN, Defendant.

ORDER DENYING PETITION FOR REHEARING—April 27, 1962

A petition for a rehearing having been filed herein by realtor pro se, Robert L. Donovan.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk.

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[fol. 107a] [File endorsement omitted.]

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[fol. 107b] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 108] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1961

No.

ROBERT L. DONOVAN, Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—May 24, 1962

Upon Consideration of the application of petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 26, 1962.

John M. Harlan, Associate Justice of the Supreme Court of the United States.

Dated this 24th day of May 1962.

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[fol. 109] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1962

No. 51 Misc.

ALBERT ANDREWS, Petitioner,

vs.

UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI —October 8, 1962

On petition for writ of Certiorari to the United States Court of Appeals for the Second Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari,

it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 491 and consolidated with No. 494 and a total of two hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this motion and petition.

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[fol. 110] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1962

No. 217 Misc.

ROBERT L. DONOVAN, Petitioner,

vs.

UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI —October 8, 1962

On petition for writ of Certiorari to the United States Court of Appeals for the Second Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 494 and consolidated with No. 491 and a total of two hours is allowed for oral argument.

Mr. Justice Goldberg took no part in the consideration or decision of this motion and petition.

☆ U. S. GOVERNMENT PRINTING OFFICE 1962 682630 873